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THE LAW RELATING TO COVENANTS RUNNING WITH LAND.

BY

R. CUTHBERT BROWN, M.A.,

OF LINCOLN'S INN, BARRISTER-AT-LAW.

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PREFACE.

In this book the authorities dealing with Covenants running with land have been collected and considered and arranged in such a way that they may be easily referred to. The author hopes that members of the legal profession may find it a convenience to have these cases collected together in one volume.

Incidentally a few paragraphs have been inserted relating to Conditions running with land, which are of importance in reference to land registered under the Land Transfer Acts.

R. C. B.

14, Old Square,
Lincoln's Inn,
January, 1907.

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COVENANTS RUNNING WITH LAND.

CHAPTER I.

INTRODUCTORY.

What a covenant is.

A COVENANT is an agreement between two or more persons, by deed (*a*). In most cases the subject-matter of the covenant is something which is in the future or the past, and it has been stated that the action of covenant would not generally lie on a covenant *in præsenti;* but on some covenants—*e.g.* a vendor's covenant that he has good right to convey—the action might be maintained (*b*). A covenant may be either negative or affirmative. (*a*) See 1 Davidson Prec. 84 (5th ed.); Shepp. Touch. 160; (*b*) Platt Covenants, 3.

The word "covenant" may be construed to mean an agreement not under seal to effectuate the intention of the parties. *Hayne* v. *Cummings*, (1864) 16 C. B. N. S. 421.

Covenants express or in deed; implied or in law.

Covenants are distinguished into express and implied covenants, or, as they are sometimes termed, covenants in deed and covenants in law. A covenant is express, when it is expressed in the deed; implied when the deed does not express it, but the law makes and supplies it. Shepp. Touch. 160; Platt Covenants, 25.

Chap. I.

1. Express Covenants.

No technical words necessary.

No technical words are necessary to the creation of a covenant; therefore any words will be sufficient which show the intention of the parties. 4 Cruise's Dig. 368, Tit. XXXII., Ch. XXVI., sect. 5 (4th ed.); Shepp. Touch. 162; *Williams* v. *Burrell*, (1845) 1 C. B. 402; *Rigby* v. *Great Western Railway Co.*, (1845) 14 M. & W. 816; *Cannock* v. *Jones*, (1849) 3 Ex. 233; *Wood* v. *The Copper Miners' Co.*, (1849) 7 C. B. 906; *Farrall* v. *Hilditch*, (1859) 5 C. B. N. S. 840; *Monypenny* v. *Monypenny*, (1859) 3 De G. & J. 572; *Lay* v. *Mottram*, (1865) 19 C. B. N. S. 479; *Brookes* v. *Drysdale*, (1877) 3 C. P. D. 52; *Mackenzie* v. *Childers*, *per* Kay, J., (1889) 43 Ch. D. 275.

But the words used must show an intention that there should be an agreement between the covenantor and the covenantee. *Re Cadogan and Hans Place Estate; Ex parte Willis*, (1895) 73 L. T. 387.

A firm as such cannot enter into a covenant; for covenantors must covenant in their own names. *Ex parte Stone; In re Welch*, (1873) L.R. 8 Ch. p. 917; *John Brothers Abergarw Brewery Co.* v. *Holmes*, [1900] 1 Ch. p. 195.

May be created by indenture or deed poll.

A covenant may be created by indenture, or by deed poll; for the covenantee's acceptance of the deed is such an assent to the agreement as will render it binding on him 4 Cruise's Dig. 368, Tit. XXXII., Ch. XXVI., sect. 3 (4th ed.); 2 Prest. Con. 412 (3rd ed. 1825); *Green* v. *Horne*, (1694) 1 Salk. 197.

The covenantee must be named or sufficiently designated in a deed poll. *Green* v. *Horne*, *supra*; *Sunderland Marine Insurance Co.* v. *Kearney*, (1851) 16 Q. B. 938.

When a deed is made *inter partes*, no one who is not

expressed to be a party can sue on a covenant contained in it, at common law. *Chesterfield and Midland Silkstone Colliery Co.* v. *Hawkins*, (1865) 3 H. & C. 677; 1 Davidson Prec. 84 (5th ed.), and cases there cited.

But a person may be made a party to a deed *inter partes* by description as belonging to a defined class. *Reeves* v. *Watts*, (1866) L. R. 1 Q. B. p. 416; *Isaacs* v. *Green*, (1867) L. R. 2 Ex. 352.

However, it is enacted by 8 & 9 Vict. c. 106, sect. 5, that under an indenture, executed after the 1st day of October, 1845, the benefit of a condition or covenant, respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture. This section does not enable a covenant to be made with a person who is not in existence at the date of the deed. *Kelsey* v. *Dodd*, (1881) 52 L. J. Ch. 39.

A covenantor, if he executes the deed, is bound by it, though he is not named a party to the deed. *Salter* v. *Kidgly*, (1689) Carth. 76.

When a party does not execute the deed.

If the covenantor has not executed the deed containing the covenant he may in some cases be bound by it. If he takes the benefit of the deed he is bound in equity by covenants on his part contained in it; though he has not executed the deed. *Formby* v. *Barker*, [1903] 2 Ch. 547; Co. Litt. 231a; *per* Lord Denman, C.J., *Webb* v. *Spicer*, (1849) 13 Q. B. 893; *The King* v. *Houghton-le-Spring*, (1819) 2 B. & Ald. 377; *Willson* v. *Leonard*, (1840) 3 Beav. 373; *per* Lord Tenterden, C.J., *Hawkins* v. *Sherman*, (1828) 3 C. & P. 462; *per* Abbott, C.J., *Burnett* v. *Lynch*, (1826) 5 B. & C. 602; but see *Witham* v. *Vane*, (1881) 44 L. T. 718; (1883) 32 W. R. 617; Challis Real Property, 401 (2nd ed.); Platt Covenants, 10.

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A covenantee in an ordinary indenture, who is a party to it, may sue the covenantor who executed it, although he himself has not executed it. *Morgan* v. *Pike*, (1854) 14 C. B. 473; *Rose* v. *Poulton*, (1831) 1 L. J. N. S. K. B. 5. But it has been held by Courts of law that, in the case of a lease, if the lessor does not execute the lease, the tenant, although he enters, does not get the consideration on which the covenants attach, viz., the grant of a term; and is not bound by covenants which depend on the interest of the lease, such as those to repair and pay rent during the term, although he has executed the deed containing them. *Pitman* v. *Woodbury*, (1848) 3 Ex. 4; *Swatman* v. *Ambler*, (1852) 8 Ex. 72; *Boyle* v. *Monk*, (1857) 7 Ir. C. L. R. 279; *per* Cockburn, C.J., *Toler* v. *Slater*, (1867) L. R. 3 Q. B. 45; see also *Cooch* v. *Goodman*, (1842) 2 Q. B. 580; distinguish *Babington* v. *O'Connor*, (1887) 20 L. R. Ir. 246, 253.

If the lessor does not execute the lease, his devisee cannot maintain an action of covenant as assignee of the reversion. *Cardwell* v. *Lucas*, (1836) 2 M. & W. 111, 123; 6 L. J. Ex. 52.

As to whether a lease need be signed by the lessor, see *Aveline* v. *Whisson*, (1842) 4 Man. & G. 801; 12 L. J. C. P. 58; *per* Parke, B., *Cherry* v. *Heming*, (1849) 4 Ex. 635; *Cooch* v. *Goodman*, (1842) 11 L. J. Q. B. 225.

If a tenant is in possession under an agreement for a lease, which the landlord has not executed, the landlord can enforce the tenant's covenants contained in the agreement, if he could in the same Court and at the same time specifically enforce the agreement to take the lease. *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 608.

When a tenant for life and remainderman grant a lease according to their respective estates, the tenant for life can sue on the lessee's covenants, although the remainderman has not executed the lease. *How* v. *Greek*, (1864) 3 H. & C. 391.

2. Implied Covenants.

By a landlord.

The law in some cases implies a covenant, when there is no express covenant. Thus, if a lease contains no express covenant for quiet enjoyment, the law implies a covenant for quiet enjoyment from the use of the word "demise." Shepp. Touch. 165; *Baynes & Co.* v. *Lloyd & Sons*, [1895] 2 Q. B. 610; *Spencer's Case*, (1582) 5 Rep. 16a, 4th Resolution.

It is uncertain whether any covenant in law is implied by the use of the word "let." *Jones* v. *Lavington*, [1903] 1 K. B. 253; *Budd-Scott* v. *Daniell*, [1902] 2 K. B. 351.

But it has been held that a contract by the lessor for quiet enjoyment arises from the mere relation of landlord and tenant. *Budd-Scott* v. *Daniell*, *supra*; but see *per* Collins, M.R., *Jones* v. *Lavington*, *supra*, 257; *per* Kay, L.J., *Baynes & Co.* v. *Lloyd & Sons*, *supra*, 615.

The duration of these covenants does not extend beyond the lessor's own estate: they do not cover lawful interruption by a person claiming under title paramount. *Baynes & Co.* v. *Lloyd & Sons*, *supra*; *Jones* v. *Lavington*, *supra*; *Adams* v. *Gibney*, (1830) 6 Bing. 656; *Schwartz* v. *Locket*, (1889) 61 L. T. 719.

It has been held by a Court of law that an implied covenant cannot arise on the demise of a party having only an equitable estate. *Smith* v. *Pocklington*, (1831) 1 Cr. & Jer. 445.

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Where there is an express covenant for quiet enjoyment, it restrains and qualifies the covenant in law. *Nokes's Case*, (1599) 4 Rep. 80b; *Merrill* v. *Frame*, (1812) 4 Taunt. 329; *Line* v. *Stephenson*, (1838) 5 Bing. N. C. 183.

A contract by a landlord to pay an outgoing tenant according to the custom of the country is imported by law into the terms of a lease, unless this is expressly excluded by the parties. *Faviell* v. *Gaskoin*, (1852) 7 Ex. 273; 21 L. J. Ex. 85; *Wigglesworth* v. *Dallison*, (1779) 1 Smith L. C. 545 (11th ed.).

It seems that assignees of the reversion may be sued on an implied contract to pay the outgoing tenant according to the custom: *Womersley* v. *Dally*, (1857) 26 L. J. Ex. 219.

By a tenant.

Similarly, the obligation of a tenant to use the premises in a tenant-like manner (*a*), or husband-like manner (*b*), has been treated in some cases as arising *ex contractu*. (*a*) *White* v. *Nicholson*, (1842) 4 Man. & G. 95; *Horsefall* v. *Mather*, (1815) Holt N. P. C. 7; *Leach* v. *Thomas*, (1835) 7 Car. & P. 327; *Auworth* v. *Johnson*, (1832) 5 Car. & P. 239; (*b*) *Powley* v. *Walker*, (1793) 5 Term Rep. 373; *Legh* v. *Hewitt*, (1803) 4 East, 154.

There is no implied contract to use demised premises in a tenant-like manner, when the tenant has expressly contracted to repair. *Standen* v. *Chrismas*, (1847) 10 Q. B. 135; distinguish *White* v. *Nicholson*, *supra*.

A tenant of land, adjoining land of his own, contracts to keep and leave the boundary between the properties distinct. *Spike* v. *Harding*, (1878) 7 Ch. D. 871, 874; *A.-G.* v. *Fullerton*, (1813) 2 Ves. & B. 263.

There is, also, some authority for the view that a

covenant in law to pay the rent is implied by the use of the words "yielding and paying," when the lease is by indenture and executed by both parties. 2 Platt Leases, 87; Platt Covenants, 50; but see cases cited 1 Wms. Saund. 305 (*f*) (1871 ed.).

There is no contract implied upon the letting of a public-house not to suffer the premises to be used in a manner calculated to produce a forfeiture of the licence. *Maw* v. *Hindmarsh*, (1873) 28 L. T. 644.

3. Real and Personal Covenants.

Real covenants.

Covenants are further distinguished into real and personal covenants. "The essential difference between a real and a personal covenant is that a real covenant runs with the land, and extends to all who claim the land under the grantee, for it descends to the heir, and is also transferred to a purchaser." 4 Cru. Dig. 372; see also Shepp. Touch. 161; 1 Davidson Prec. 88 (5th ed.); Platt Covenants, 60.

Personal covenants

A covenant is personal when it does not run with the land, but some person in particular has the benefit of it or is charged with it. Shepp. Touch. 161.

A proviso limiting the personal liability of a covenantor may be valid. *Williams* v. *Hathaway*, (1877) 6 Ch. D. 544.

Covenants running with land.

The expression "covenant running with land" means that a covenant is of such a nature that it will run with land. But if a covenant in a lease is said to run with the land the term is referred to as distinguished from the reversion.

"A covenant is said to run with land, when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that land. A covenant is

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said to run with the reversion, when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that reversion." 1 Smith L. C., notes to *Spencer's Case*.

The covenant passes with the estate in the land to which it is annexed; but the moment that estate is spent the covenant is at an end, as against the possessor of the land. See *Duchess of Chandos* v. *Brownlow*, (1791) 2 Bidgew. P. C. 410; *Spencer's Case*, (1582) 5 Rep. 16a, 5th Resolution; *Muller* v. *Trafford*, [1901] 1 Ch. 54.

Covenants running with land are covenants *in personam* as against the covenantor and his representatives after his death in respect of assets. Shepp. Touch. 161; *Stevenson* v. *Lambard*, (1802) 2 East, 575.

Inherent covenants.

Inherent covenants are such as are conversant about the land, and knit to the estate in the land. Shepp. Touch. 161, 176.

Collateral covenants.

Collateral covenants are conversant about some collateral thing that does not at all or so immediately concern the thing granted; as to pay a sum of money in gross or build a house on another man's land; or are not knit to the estate because they are entered into with a stranger to it. Shepp. Touch. 161.

Covenants in gross.

Collateral covenants are also termed covenants in gross. But a covenant cannot be called collateral if it relates to the thing granted, though assignees are not bound by it; as in the case of a covenant relating to personal chattels. Platt Covenants, 70.

4. Several, Joint, and Joint and Several Covenants.

When more persons than one are covenantors they may covenant severally, jointly, or jointly and severally.

A covenant, also, which is made with more than one person may be made with the covenantees severally or jointly. As regards such covenants the liability of covenantors is to be distinguished from the rights of covenantees.

(i.) *Liability of Covenantors.*

Several covenants.

"Where more persons than one are covenantors, and each undertakes only to the extent of his own acts and defaults, without entailing on himself the necessity of making reparation in case of a breach by the other or others, this is termed a several covenant. It is in all respects the same as if each of the covenantors had executed a separate deed on the same parchment." Platt Covenants, 115; *Mathewson's Case*, (1597) 5 Rep. 23a; *S. C.* nom. *Matthewson* v. *Lydiate*, Cro. Eliz. 408, 546.

Although a promise by two contractors be in terms several only it may be treated as joint, if it appears upon an instrument that this was the intention of the parties. *Lee* v. *Nixon*, (1834) 3 N. & M. 441.

Joint covenants.

"A person with whom a covenant is to be entered into, may be dissatisfied with the separate responsibility of the parties, and may require that each covenantor shall not only be liable for his own, but also for the acts and defaults of his co-covenantor. Hence have arisen covenants joint; by which, each party becomes answerable for himself, and is in effect a surety also for the due performance of the covenant by the other." Platt Covenants, 116; citing *Lilly* v. *Hodges*, or *Hedges*, 8 Mod. 166; *S. C.* 1 Stra. 553; see also *Whelpdale's Case*, (1604) 5 Rep. 119.

The liability of joint covenantors passes on the death

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of each to the survivors, and to the representatives of the last survivor. *Sumner* v. *Powell*, (1816) 2 Mer. 30; (1823) Turn. & R. 423; *White* v. *Tyndall*, (1888) 13 App. Cas. 263.

It is not a principle of equity that every joint covenant shall be considered as if it were joint and several. When the obligation exists only by virtue of the covenant its extent can be measured only by the words of the covenant. But there are cases in which the Court will treat a joint obligation as several. See *Sumner* v. *Powell*, *supra*; *Clarke* v. *Bickers*, (1845) 14 Sim. 639; *Wilmer* v. *Currey*, (1848) 2 De G. & Sm. 347; *Kendall* v. *Hamilton*, (1879) 4 App. Cas. 504; *White* v. *Tindall*, (1888) 13 App. Cas. 263; see also *National Society*, *&c.* v. *Gibbs*, [1900] 2 Ch. 280.

It seems that this is the case whenever the Court sees that the intention of the parties was that the covenant though joint in form should be joint and several. 2 Williams Executors (10th ed.), 1375.

The non-joinder of a co-covenantor does not defeat an action on a joint covenant. *Per* Lord Blackburn, *Kendall* v. *Hamilton*, (1879) 4 App. Cas. 543; *per* Parke, B., *King* v. *Hoare*, (1844) 13 M. & W. 494, 505.

But all the co-covenantors should be made defendants. If an action is brought against one only of several joint covenantors, the defendant may apply under Order XVI., r. 11, to have the others joined, and if there is no reason to the contrary the Court will declare that the plaintiff is bound to serve them. *Pilley* v. *Robinson*, (1887) 20 Q. B. D. 155; *Robinson* v. *Geisel*, [1894] 2 Q. B. 685, 687; *Fardell Traction*, *&c.*, *Co.* v. *Basset*, (1899) 15 Times Rep. 204.

Since the abolition of pleas in abatement a defendant,

who objects to the non-joinder of a co-covenantor, should apply by summons to have the action stayed until the co-covenantor is joined. Evidence should be given in support of the application to show that the person alleged to be jointly liable is within the jurisdiction. *MacArthur* v. *Hood*, (1885) 1 Cab. & E. 550.

The action will not be stayed on the ground that a joint covenantor has not been served, if it appears that the plaintiff has done everything in his power to effect service. *Robinson* v. *Geisel*, *supra*.

A joint covenantor who is out of the jurisdiction need not ordinarily be joined. *Wilson, Sons & Co.* v. *Balcarres Brook Steamship Co.*, [1893] 1 Q. B. 422.

A covenantee who has obtained judgment in an action on a joint covenant may recover the whole amount from one of the joint covenantors. He has nothing to do with the contribution between them. *Clough* v. *Clough*, (1801) 5 Ves. 717; see also Leake Contracts, 298 (5th ed. 1906).

A judgment recovered against one joint covenantor is a bar to proceedings against another joint covenantor. *King* v. *Hoare*, (1844) 13 M. & W. 494; *Kendall* v. *Hamilton*, (1879) 4 App. Cas. 504.

This rule applies when one of the joint covenantors is a married woman contracting in respect of her separate property. *Hoare* v. *Niblett*, [1891] 1 Q. B. 781.

The judgment is a bar to further proceedings, though it was taken by consent. *McLeod* v. *Power*, [1898] 2 Ch. 295.

Moreover, there is no jurisdiction to set the judgment aside with the consent of the defendant against whom it has been obtained, in order that the plaintiff may take

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proceedings against all the joint covenantors. *Hammond* v. *Schofield*, [1891] 1 Q. B. 453.

But a plaintiff who obtains judgment under Order XIV. (*a*), or enters judgment in default of appearance (*b*) against one of two joint defendants, does not abandon his right to proceed to judgment against the other defendant. (*a*) *Per* Byrne, J., *McLeod* v. *Power*, *supra*, 300; *Weall* v. *James*, (1893) 68 L. T. 515; *Walton & Co.* v. *Topakyan, &c.*, (1905) 53 W. R. 657; (*b*) *per* Byrne, J., *ib.*; *Pim* v. *Coyle*, [1903] 2 Ir. R. 457; *cf.* *Montgomerie* v. *Ferris & Brown*, (1887) 20 L. R. Ir. 282; *Rice* v. *Dillon & Coghlan*, (1890) 28 L. R. Ir. 376.

An unsatisfied judgment recovered against one joint covenantor is not a bar to proceedings against another joint covenantor in respect of a separate cause of action. *Wegg Prosser* v. *Evans*, [1895] 1 Q. B. 108.

Joint and several covenants.

"Joint and several covenants are, as the term denotes, a combination of the two former. The difference is that they afford the covenantee the election of suing on either. In some respects they are considerably more beneficial to the covenantee than the others: without prejudicing the several, they ensure the joint liability; and although the advantage of the joint security may be defeated by the insolvency of the survivor, the assets of the deceased covenantor may be charged in the hands of his representatives on the separate covenant." Platt Covenants, 117, citing *Enys* v. *Donnithorne*, (1761) 2 Burr. 1196; Platt Covenants, 133.

If the covenant is joint and several a judgment recovered against one covenantor is not a bar to proceedings against another covenantor, unless the judgment has been satisfied. *King* v. *Hoare*, (1844) 13 M. & W.

494; see also *Parker* v. *Hamilton*, (1892) 30 L. R. Ir. 156.

The right of contribution between co-covenantors.

It has been laid down that the right to contribution between joint covenantors rests upon a broad principle of equity, though in some cases it has been attributed to an implied contract. Evidence is admissible for the purpose of showing that the equity ought not to be applied. See *per* Stirling, J., *Re Bentinck; Bentinck* v. *Bentinck* (No. 2), (1899) 80 L. T. 71; *Dering* v. *Earl of Winchelsea*, (1787) 1 Cox, 318.

In cases dealing with sureties it has been laid down that the sureties are to contribute equally, if each is a surety to an equal amount, and if not equally, then proportionately to the amount for which each is a surety. *Ellesmere Brewery Co.* v. *Cooper*, [1896] 1 Q. B. 75; *Lowe* v. *Dixon*, (1885) 16 Q. B. D. 455, 458; see also *In re Denton's Estate*, [1903] 2 Ch. 670, 679; [1904] 2 Ch. 178.

Release of one co-covenantor.

When several persons are liable jointly or jointly and severally, a release of one is a release of all. This principle is independent of any doctrine peculiar to the law of principal and surety. In each case, however, it has to be determined whether what has occurred amounts to a release. *Re Wolmershausen*, (1890) 62 L. T. 541; *cf. In re E. W. A.*, [1901] 2 K. B. 642.

Under the law of principal and surety a creditor must not do anything to prejudice the right of contribution between co-sureties. If he does the sureties will be released either wholly or *pro tanto*. See *Re Wolmershausen, supra; Ward* v. *National Bank of New Zealand*, (1883) 8 App. Cas. 755.

When sureties contract severally the creditor does not

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necessarily release one by releasing another. *Ward* v. *National Bank of New Zealand, supra.*

(ii.) *Rights of Covenantees.*

Several covenants.

If similar covenants are entered into by a covenantor with several covenantees and an action is brought by one covenantee only, the Court, upon the application of the defendant, may order the other covenantees to be joined under Order XVI., r. 11. *Dix* v. *The Great Western Railway Co.*, (1886) 55 L. J. Ch. 797.

Joint covenants.

All the covenantees must join in an action on a covenant which is made with them jointly. *Wetherell* v. *Langston*, (1847) 1 Ex. 634; *Petrie* v. *Bury*, (1824) 3 B. & C. 353; see also *per* Lord Blackburn, *Kendall* v. *Hamilton*, (1879) 4 App. Cas. 543.

But a joint covenantee may be joined as a defendant if he refuses to join as a co-plaintiff. *Cullen* v. *Knowles*, [1898] 2 Q. B. 380.

On the death of a joint covenantee the right to sue on the covenant passes to the surviving covenantees, the executor of the deceased covenantee taking no interest in the covenant. Platt Covenants, 132, citing *Anderson* v. *Martindale*, (1801) 1 East, 497; *Southcote* v. *Hoare*, (1810) 3 Taunt. 87; see also *Powell* v. *Brodhurst*, [1901] 2 Ch. p. 164.

Joint and several covenants.

One and the same covenant cannot be made both joint and several with the covenantees. See *per* Parke, B., *Bradburn* v. *Botfield*, (1845) 14 M. & W. 573; *per* Pollock, C.B., *Keightley* v. *Watson*, (1849) 3 Ex. 716, 721; *Slingsby's Case*, (1588) 5 Rep. 19a; see also 1 Davidson Prec. 92 (5th ed.).

5. PROVISIONS OF THE CONVEYANCING AND LAW OF PROPERTY ACT, 1881.

By the Conveyancing Act, 1881, sect. 58:—"(1) A covenant relating to land of inheritance, or devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed.

"(2) A covenant relating to land not of inheritance, or not devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his executors, administrators, and assigns, and shall have effect as if executors, administrators, and assigns were expressed.

"(3) This section applies only to covenants made after the commencement of this Act."

59.—"(1) A covenant, and a contract under seal, and a bond or obligation under seal, though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators and personal estate, of the person making the same, as if heirs were expressed.

"(2) This section extends to a covenant implied by virtue of this Act.

"(3) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the terms of the covenant, contract, bond, or obligation, and to the provisions therein contained.

"(4) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act."

"60.—(1) A covenant, and a contract under seal, and a bond or obligation under seal, made with

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two or more jointly, to pay money or to make a conveyance, or to do any other act, to them or for their benefit, shall be deemed to include, and shall, by virtue of this Act, imply, an obligation to do the act to, or for the benefit of, the survivor or survivors of them, and to, or for the benefit of, any other person to whom the right to sue on the covenant, contract, bond, or obligation devolves.

"(2) This section extends to a covenant implied by virtue of this Act.

"(3) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation and shall have effect subject to the covenant, contract, bond, or obligation, and to the provisions therein contained.

"(4) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act."

These sections render it unnecessary to express in a covenant that it is made by the covenantor "for his heirs" and with the "heirs and assigns" or "executors, administrators and assigns" of the covenantee.

But in some cases covenants do not run with land unless the covenantor expressly covenants "for his assigns." See *infra*, p. 19.

The use of the words "successors and assigns" may be important as showing an intention to give successors and assigns the benefit of a covenant. But that intention may be gathered from other indications. See *John Brothers Abergarw Brewery Co.* v. *Holmes*, [1900] 1 Ch. 195.

When the benefit of a covenant is intended to run with a particular plot of land it is in many cases desirable that this intention should be expressed on the

face of the deed. See *Rogers* v. *Hosegood*, [1900] 2 Ch. 404. Chap. I.

Sect. 60 makes it unnecessary that a covenant made with several persons jointly should be expressed to be made with the survivors of them. It seems that this section does not apply to a covenant to pay money, &c., to some person other than the covenantees. See also *supra*, p. 14.

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COVENANTS MADE BETWEEN LANDLORD AND TENANT.

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In considering whether a covenant runs with land or not, covenants contained in leases and made between landlord and tenant are to be distinguished from other covenants; for the authorities which are applicable in the one case are often inapplicable in the other. *Cf. per* Lindley, L.J., *Austerberry* v. *Corporation of Oldham*, (1885) 29 Ch. D. 781.

1. Nature and Form of Covenants running with Land.

The covenant must touch or concern the thing demised.

A covenant does not run with the land at law unless it touches or concerns the thing demised. *Spencer's Case*, (1582) 5 Rep. 16a, 1st and 2nd Resolutions.

A covenant touches or concerns the thing demised if it affects the nature, quality, or value of the thing demised, independently of collateral circumstances; or if it affects the mode of enjoying it. See *per* Lord Ellenborough, *The Mayor of Congleton* v. *Pattison*, (1808) 10 East, 135; *Keppell* v. *Bailey*, (1834) 2 Myl. & K. 537; *Fleetwood* v. *Hull*, (1889) 23 Q. B. D. 37; *White* v. *Southend Hotel Co.*, [1897] 1 Ch. 771; *Horsey Estate, Limited* v. *Steiger*, [1899] 2 Q. B. 89.

Other authorities have laid down that in order to bind the assignee the covenant must either affect the land itself during the term, such as those which regard the

mode of occupation; or it must be such as *per se*, and not merely from collateral circumstances, affects the value of the land at the end of the term. *Per* Bayley, J., *Mayor of Congleton* v. *Pattison*, *supra*, p. 138; *per* Farwell, J., *Rogers* v. *Hosegood*, [1900] 2 Ch. 395.

It appears that a covenant "may run with the land or the reversion, although the subject-matter of the covenant is not a thing to be done on the leasehold premises, provided it relates to the mode of their occupation and enjoyment." *Morris* v. *Kennedy*, [1896] 2 Ir. R. 251; *Jourdain* v. *Wilson*, (1821) 4 B. & Ald. 266; *Easterby* v. *Sampson*, (1830) 6 Bing. 644; *Athol* v. *The Midland Great Western Railway Co.*, (1868) Ir. R. 3 C. L. 333; distinguish *Thomas* v. *Hayward*, (1869) L. R. 4 Ex. 311.

When assigns must be named.

Of covenants which touch or concern the thing demised those which concern something which is part of the demised premises and is in existence at the date of the covenant, are enforceable by and against assigns, though assigns are not named in the covenant. But if the covenant relates to something which is not in existence it does not bind assigns unless they are named. Thus, if a lessee covenants to repair the demised premises, his assigns are bound; but if he covenants to build a wall upon the demised premises, his assigns are not bound, unless he covenants for his assigns. *Spencer's Case*, (1582) 5 Rep. 16a, 1st and 2nd Resolutions; considered, *Bally* v. *Wells*, (1769) 3 Wils. 32; Wilmot, 349; but see *Minshull* v. *Oakes*, (1858) 2 H. & N. 793.

Similarly, if the lessee covenants for himself and his assigns to build upon the demised premises, assigns of the reversion can sue on the covenant (*a*). But if the lessor covenants to build on the premises not naming assigns, assigns of the reversion are not bound by the covenant (*b*).

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(*a*) *Easterby* v. *Sampson*, (1880) 6 Bing. 652; (*b*) *Doughty* v. *Bowman*, (1848) 11 Q. B. 444, 454.

In *Minshull* v. *Oakes*, (1858) 2 H. & N. 809, Pollock, C.B., held that a lessee's covenant to repair all buildings which might thereafter be erected ran with the land, though assigns were not named. For the covenant was not absolutely to do a new thing, but if there were new buildings to repair them; and new buildings would be part of the thing demised, and the covenant extended to its support.

See also, as to this rule, *South of England, &c.* v. *Baker*, [1906] 2 Ch. p. 637.

Covenants running with the land.

The following covenants have been held to touch or concern the thing demised, and to run with the land or the reversion.

(i.) *Covenants in which Assigns were not named.*

Lessee's covenants.

A lessee's covenant to pay rent. *Parker* v. *Webb*, (1703) 3 Salk. 5.

A covenant to pay taxes. See *The Dean and Chapter of Windsor's Case*, (1601) 5 Rep. 24a; see, also, *Wix* v. *Ruston*, [1899] 1 Q. B. 474, where assigns were named.

Covenants to repair (*a*); to put in repair (*b*); to repair buildings erected during the term on the demised premises (*c*); to leave in repair at the end of the term (*d*). (*a*) *Spencer's Case*, (1582) 5 Rep. 16a, 6th Resolution; (*b*) *Martyn* v. *Clue*, (1852) 18 Q. B. 661; (*c*) *Minshull* v. *Oakes*, (1858) 2 H. & N. 793; (*d*) *Martyn* v. *Clue*, *supra*; *Matures* v. *Westwood*, (1598) Cro. Eliz. 599.

To deliver up possession peaceably. Vin. Ab. Covenant (K.) 19; *Matures* v. *Westwood*, *supra*.

To leave the land at the end of the term well stocked with game. *Hooper* v. *Clark*, (1867) L. R. 2 Q. B. 200.

To reside upon the premises during the term. *Tatem* v. *Chaplin*, (1793) 2 H. Bl. 133.

To use a house as a private dwelling-house only. *Wilkinson* v. *Rogers*, (1864) 10 Jur. N. S. 5.

Not to carry on a specified trade upon the premises. *Mayor, &c., of Congleton* v. *Pattison*, (1808) 10 East, 136, 138.

To manage the business of an inn in such a manner that the licence may not be suspended, &c. *Fleetwood* v. *Hull*, (1889) 23 Q. B. D. 35.

Not to sell beer on the premises other than that supplied by the lessors. *White* v. *Southend Hotel Co.*, [1897] 1 Ch. 771; *Clegg* v. *Hands*, (1890) 44 Ch. D. 503; applied, *per* Collins, M.R., *British Electric Traction Co.* v. *Inland Revenue Commissioners*, [1902] 1 K. B. 451.

Covenants as to cultivation of the land. *Cockson* v. *Cock*, (1606) Cro. Jac. 125; *Sale* v. *Kitchingham*, (1713) 10 Mod. 158.

To use upon the land all hay and straw grown on the land. *Clegg* v. *Hands*, (1890) 44 Ch. D. 512; *Pollitt* v. *Forrest*, (1847) 11 Q. B. 960; *Bally* v. *Wells*, (1769) Wilmot, 350.

To permit the lessor to enter, through the demised premises, to a room excepted from the demise. *Bush* v. *Calis*, (1692) 1 Show. 388; *S. C.* Carth. 232; 12 Mod. 24; also reported as *Cole's Case*, 1 Salk. 196; see also *Lord Dynevor* v. *Tennant*, (1888) 13 App. Cas. 279.

By lessees (*quære*, for their assigns) to permit the landlord to make use of machinery to descend into and view demised mines. *Bradburne* v. *Botfield*, (1845) 14 M. & W. 573; 14 L. J. Ex. 330.

Lessor's covenants.

Lessor's covenants to renew the lease (*a*) and to apply

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for and endeavour to obtain renewal of a head lease (*b*). (*a*) *Muller* v. *Trafford*, [1901] 1 Ch. 60; *Furnival* v. *Crew*, (1744) 3 Atk. 87; *Isteed* v. *Stoneley*, (1664) 1 And. 82; (*b*) *Simpson* v. *Clayton*, (1838) 4 Bing. N. C. 780.

To provide timber for repairing. *Spencer's Case*, (1582) 5 Rep. 16a, 5th Resolution; see also *Palmer* v. *Edwards*, (1783) 1 Dougl. 186, n., in which assigns were named.

A covenant by the landlord for himself, his executors, &c., to supply the demised premises with water. *Jourdain* v. *Wilson*, (1821) 4 B. & Ald. 266.

(ii.) *Covenants in which Assigns were named.*

Lessee's covenants.

Lessee's covenants to repair, renew, and replace tenant's fixtures and machinery fixed to the premises. *Williams* v. *Earle*, (1868) L. R. 3 Q. B. 739.

To build on the demised land. *Spencer's Case*, (1582) 5 Rep. 16a, 2nd Resolution.

A covenant to erect a smelting mill in a lease of mines with power and authority to erect a smelting mill. *Sampson* v. *Easterby*, (1829) 9 B. & C. 505; (1830) 6 Bing. 644; 1 C. & J. 105; considered, *Keppell* v. *Bailey*, (1834) 2 My. & K. 542.

To insure and apply the insurance money in reinstating the premises. See *Vernon* v. *Smith*, (1821) 5 B. & Ald. 1, 8; see also *Ex parte Gorely*, (1864) 34 L. J. Bank. 1; *Westminster Fire Office* v. *Glasgow Provident Society*, (1888) 13 App. Cas. 713, 716.

A covenant to take tithes in kind in a lease of tithes. *Bally* v. *Wells*, (1769) 3 Wils. 25; Wilmot, 341.

A covenant to carry all coal to be gotten from specified lands over a railway and to pay a toll of twopence

per ton in respect of it. *Hemingway* v. *Fernandes*, (1842) 13 Sim. 228.

A covenant in a mining licence to pay compensation for damage done to the surface. *Norval* v. *Pascoe*, (1864) 34 L. J. Ch. 82.

Not to assign without licence. *McEacharn* v. *Colton*, [1902] A. C. 104; *West* v. *Dobb*, (1869) L. R. 4 Q. B. 637, n.; *Williams* v. *Earle*, (1868) L. R. 3 Q. B. 739; *per* Lord Russell, C.J., *Horsey Estate, Limited* v. *Steiger*, [1899] 2 Q. B. 89.

It has been held in Ireland that a covenant by a lessee, his executors, administrators and assigns not to assign their interest in the premises without giving the first refusal thereof to the landlord was a covenant that runs with the land. *In re Houghton*, (1860) 11 Ir. Ch. Rep. 136.

Lessor's covenants.

Lessor's covenants for quiet enjoyment. *Williams* v. *Burrell*, (1845) 1 C. B. 402.

To allow deduction from rent of sums charged on the premises and paid by the tenant. *Baylye* v. *Hughes*, (1628) Cro. Car. 137; see also *White* v. *Southend Hotel Co.*, [1897] 1 Ch. 767.

That the lessee may use water carried to the premises in a conduit. *Athol* v. *Midland Great Western Railway*, (1868) Ir. R. 3 C. L. 333.

To lay down the demised premises in grass. *Eccles* v. *Mills*, [1898] A. C. 366.

A lessor's covenant to make a new street adjoining the demised premises within one year from the date of the lease. *Morris* v. *Kennedy*, [1896] 2 Ir. R. 247, 250.

As to a covenant to pay for an outgoing tenant's crops, &c. See *Mansel* v. *Norton*, (1883) 22 Ch. D. 769, 771; *Eccles* v. *Mills*, [1898] A. C. 371.

(iii.) *Covenants in Law.*

Covenants in law between landlord and tenant run with the land. *Spencer's Case*, (1582) 5 Rep. 16a, 4th Resolution; *Nokes's Case* (1599) 4 Rep. 80b; *Vyvyan* v. *Arthur*, (1823) 1 B. & C. 410; 2 D. & R. 670.

The view has been taken in some cases that the benefit of the covenant arising on the reddendum runs with the reversion at common law. See *Harper* v. *Burgh*, (1677) 2 Lev. 206; *S. C.*, T. Jo. 102; *Vyvyan* v. *Arthur*, *supra*; 2 Platt Leases, 382.

Personal and collateral covenants.

The following covenants are personal or collateral covenants.

A covenant to pay a collateral sum of money. *Spencer's Case*, (1582) 5 Rep. 16a, 2nd Resolution; *Mayho* v. *Buckhurst*, (1617) Cro. Jac. 438.

To pay for moveable chattels on the premises at the end of the term. *Gorton* v. *Gregory*, (1862) 3 B. & S. 90.

By the lessees of a tavern to account to the lessor for the wine which he sold, and to pay so much for every tun sold. *Purfrey's Case*, (1587) Moore, 243; Godb. 120.

To pay taxes, &c., in respect of property not included in the demise. *Gower* v. *The Postmaster-General*, (1887) 57 L. T. 527.

To repair and renew moveable chattels. *Williams* v. *Earle*, (1868) L. R. 3 Q. B. 739.

To deliver up sheep, or other stock of cattle, or any other stock of personal goods at the end of the term. *Spencer's Case*, (1582) 5 Rep. 16a, 3rd Resolution.

To grind all corn the lessee shall have occasion to use or spend, at the landlord's mill, according to the custom. *Lord Uxbridge* v. *Staveland*, (1747) 1 Ves. Sen. 56;

distinguish *Vyvyan* v. *Arthur*, (1823) 1 B. & C. 410; 2 D. & R. 670.

To give security for the performance of covenants, or the payment of rent. Shepp. Touch. 161.

To name an arbitrator for the valuation of improvements. *Grey* v. *Cuthbertson*, (1785) 4 Dougl. 351.

To indemnify a tenant against breaches of covenants contained in a head lease. *Doughty* v. *Bowman*, (1848) 11 Q. B. 454.

To build upon land not parcel of the demise. *Spencer's Case*, (1582) 5 Rep. 16a, 2nd Resolution.

Not to fell trees excepted from the demise. *Per* Lord Abinger, *Raymond* v. *Fitch*, (1835) 2 C. M. & R. 599.

Not to keep a public-house within half a mile of the premises. *Thomas* v. *Hayward*, (1869) L. R. 4 Ex. 311.

Not to employ workmen on the premises who are settled in another parish. *Mayor, &c., of Congleton* v. *Pattison*, (1808) 10 East, 130.

To make a lease of other land. Shepp. Touch. 161.

To grant a new lease, if an extension is obtained by the covenantor from a person, who is not his landlord, and therefore not by way of renewal. *Muller* v. *Trafford*, [1901] 1 Ch. 54, 60.

To give the tenant the refusal of land not included in the demise. *Collison* v. *Lettsom*, (1815) 6 Taunt. 224; considered, Sugden Vendors and Purchasers, 597 (14th ed.).

A lessor's covenant that the lessee may cut turf in land of the lessor not included in the demise does not bind assigns of such land. *Dawson* v. *Baldwin*, (1832) 1 Hay. & Jo. 24.

A covenant giving to a lessee the option to purchase

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the reversion in fee, does not concern the land, regarded as the subject-matter of the lease and is not within the statute 32 Hen. VIII. c. 34. *Woodall* v. *Clifton*, [1905] 2 Ch. 257.

A covenant that the lessor shall distrain for rent in some other land than that which is demised is collateral. Shepp. Touch. 161.

In *Daniel* v. *Stepney*, (1874) L. R. 9 Ex. 185, the Exchequer Chamber held that a power to distrain on lands not included in the demise was binding upon assignees of the lease with notice.

Conditions.

The authorities treat covenants and conditions running with land as governed by the same principles. Apart from restrictive conditions no condition which affects merely the person, and which does not affect the nature, quality, or value of the thing demised or the mode of using or enjoying the thing demised, runs with the land. *Horsey Estate, Limited* v. *Steiger*, [1899] 2 Q. B. p. 88; *Stevens* v. *Copp*, (1868) L. R. 4 Ex. 20.

A proviso for re-entry in case of bankruptcy of the tenant runs with the land. *Horsey Estate, Limited* v. *Steiger*, *supra*, 89; see also *Smith* v. *Gronow*, [1891] 2 Q. B. 394.

A proviso for re-entry in case of liquidation by a company is within the same principle. *Horsey Estate, Limited* v. *Steiger*, *supra*.

A condition that the landlord may re-enter if the tenant is convicted of an offence against the game laws does not touch the thing demised. *Stevens* v. *Copp*, (1868) L. R. 4 Ex. 20.

A proviso in a lease enabling either of the parties to determine it by notice respects the interest demised. *Roe* d. *Bamford* v. *Hayley*, (1810) 12 East, 464, 469.

2. Privity of Contract and Estate.

"There are three relations at common law, which may exist between the lessor and the lessee and their respective assignees; first, privity of contract, which is created by the contract itself, and subsists for ever between the lessor and lessee; secondly, privity of estate which subsists between the lessee, or his assignee in possession of the estate, and the assignee of the reversioner; and thirdly, privity of contract and estate, which both exist where the term and reversion remain in the original covenantors. The statute 32 Hen. VIII. c. 34, seems to have created a fourth relation, a privity of contract in respect of estate, as between the assignees of the reversion and the lessees or their assignees." *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. p. 614; *Bickford* v. *Parson*, (1848) 5 C. B. p. 929; see, further, 2 Platt Leases, 351; Sugden Vendors and Purchasers, 582, n. (14th ed.); *Walker's Case*, (1587) 3 Rep. 22a, 23a; Litt. sect. 459; *Stevenson* v. *Lambard*, (1802) 2 East, 575, 580.

Covenants made with a stranger to the reversion.

"It is not sufficient that a covenant is concerning the land, but, in order to make it run with the land, there must be a privity of estate between the covenanting parties." *Per* Lord Kenyon, *Webb* v. *Russell*, (1789) 3 Term Rep. 393, 402; *per* Farwell, J., *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 613.

If a mortgagor and mortgagee demise and the covenants are made with the mortgagor only they are in contemplation of a Court of law made with a stranger to the reversion and are collateral covenants. *Ib.*; *Stokes* v. *Russell*, (1790) 3 Term Rep. 678; (1791) 1 H. Bl. 562.

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But a covenant to pay rent reserved during the continuance of the mortgage to the mortgagee and his assigns, and after satisfaction of the mortgage to the mortgagor, runs with the land and does not become a covenant in gross till the happening of that event. *Whitaker* v. *Harrold*, (1847) 17 L. J. Q. B. 343.

It has been held that a covenant made with several covenantees jointly, one or some of whom have the legal reversion, will run with the land at law. *Wakefield* v. *Brown*, (1846) 9 Q. B. 209; followed, *Magnay* v. *Edwards*, (1853) 13 C. B. 479. See also *Wootton* v. *Steffenoni*, (1843) 12 M. & W. 129; 13 L. J. Ex. 72, where a lessor was seised in right of his wife.

Covenants made by a stranger to the reversion.

Similarly, to charge an assignee of the reversion under 32 Hen. VIII., c. 34, (see *infra*, p. 53), there must be privity of estate between the assignee and the covenantee. *Duchess of Chandos* v. *Brownlow*, (1791) 2 Ridg. P. C. p. 407.

This doctrine has been modified by the Conveyancing Act, 1881, sects. 10 and 11, as to leases made since the commencement of that Act. See also *Rogers* v. *Hosegood*, [1900] 2 Ch. p. 404.

Covenants not contained in the lease.

An agreement by a lessee, entered into with the lessor, after the commencement of the term, to pay an increased rent, there being no redemise of the land, is not enforceable against assigns of the term. *Cf. Lambert* v. *Norris*, (1837) 2 M. & W. 333; *Donellan* v. *Read*, (1832) 3 B. & Ad. 899, 905; see also Bac. Ab. Rent (C): *M'Leish* v. *Tate*, (1778) Cowp. 781, 784.

A contract to pay an increased rent in consideration of the landlord improving the demised premises does not create a new demise at the increased rent, so as to amount to a surrender of the old lease by operation of

law. *Geeckie* v. *Monk*, (1844) 1 Car. & K. 307; *Doe* v *Geekie*, (1844) 5 Q. B. 841; *Crowley* v. *Vitty*, (1852) 7 Ex. 319.

Chattels personal

A covenant in a lease of personal chattels does not bind assignees though it touches and concerns the thing demised, for there is no privity, as there is in the case of realty, between the lessor and lessee and their assigns. *Spencer's Case*, (1582) 5 Rep. 16a 3rd Resolution; *Bally* v. *Wells*, (1769) Wilmot, 341, 344; *Gorton* v. *Gregory*, (1862) 3 B. & S. 90; *Williams* v. *Earle*, (1868) L. R. 3 Q. B. 739.

A purchaser of hay, straw, &c., from any person "engaged in husbandry" is bound by a tenant's covenant to use them on the premises. 56 Geo. III. c. 50, sect. 11; *Wilmot* v. *Rose*, (1854) 3 El. & Bl. 563; *Hawkins* v. *Walrond*, (1876) 1 C. P. D. 280; *Lybbe* v. *Hart*, (1885) 29 Ch. D. 8.

3. Agreements for Leases.

If an agreement for a lease does not amount to a demise of the land the covenants contained in it do not run with the land. See *Flight* v. *Glossopp*, (1835) 2 Bing. N. C. 125; *per* Turner, L.J., *Cox* v. *Bishop*, (1857) 26 L. J. Ch. 389, 394; *The Marquis Camden* v. *Batterbury*, (1860) 7 C. B. N. S. 864; *per* Lush, J., *Elliott* v. *Johnson*, (1866) L. R. 2 Q. B. 120, 123.

But assigns who are entitled against a tenant in possession to specific performance of the agreement, can sue on the tenant's covenants in cases in which specific performance can be obtained between the same parties, in the same Court, and at the same time as the subsequent legal question falls to be determined. *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 608; *Foster* v. *Reeves*,

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[1892] 2 Q. B. 255; *cf. Archbold* v. *Scully*, (1861) 9 H. L. Cas. 360.

It seems that the benefit of the covenants in the agreement is assignable by virtue of sect. 25, sub-sect. 6, of the Judicature Act, 1873. *Manchester, &c.* v. *Coombs, supra.*

4. Devolution of the Covenants in a Lease.

(i.) *The Lessor and Lessee and their Representatives.*

Duration of the lessor's rights and liability.

The lessor can sue on a lessee's covenant for a breach which complete in his own time though he has parted with the reversion and the covenant runs with the reversion, for the right of action is vested before the assignment. See *Johnson* v. *The Churchwardens of St. Peter, Hereford*, (1836) 4 A. & E. 520, 526; *Flight* v. *Bentley*, (1835) 7 Sim. 149; 2 Platt Leases, 386.

But he cannot sue for a breach of covenant accrued after the assignment. *Walker's Case*, (1587) 3 Rep. 22a, 22b; 1 Wms. Saund. 309 (ed. 1871), note (11) to *Thursby* v. *Plant*; *Conran* v. *Pedder*, (1852) 2 Ir. C. L. R. 200; *Beely* v. *Parry*, (1684) 3 Lev. 154; *Green* v. *James*, (1840) 6 M. & W. 656.

If the lessor assigns the reversion of part of the demised premises he may sue on the lessee's covenant to pay rent for apportioned rent accrued due since the assignment. *Mayor of Swansea* v. *Thomas*, (1882) 10 Q. B. D. 48; and see *Twynam* v. *Pickard*, (1818) 2 B. & Ald. 105, 112.

A right of action once vested is not defeated by the expiration or surrender of the term. *Kinlyside* v. *Thornton*, (1776) 2 W. Bl. 1111; Shepp. Touch. 301; see also *Blore* v. *Giulini*, [1903] 1 K. B. 356.

The lessor remains liable on his express covenants,

which run with the reversion, though he has assigned the reversion. *Stuart* v. *Joy*, [1904] 1 K. B. 362; distinguish *Bath* v. *Bowles*, (1905) 93 L. T. 801.

The lessor's personal representative is the proper plaintiff in an action for a breach of covenant committed in the lessor's lifetime. *Raymond* v. *Fitch*, (1835) 2 C. M. & R. 588; *Ricketts* v. *Weaver*, (1844) 12 M. & W. 718; *Baker* v. *Gostling*, (1834) 1 Bing. N. C. 19, 28.

The lessor's personal representative.

The personal representative can sue though the reversion is freehold and the covenant runs with the reversion, if the action is brought for damage accrued in the lessor's lifetime. See *Lucy* v. *Levington*, (1671) 2 Lev. 26; *Kingdon* v. *Nottle*, (1813) 1 M. & S. 355; (1815) 4 M. & S. 53, followed; *Orme* v. *Broughton*, (1834) 4 M. & Sc. 417; 10 Bing. 533.

He alone can sue if the reversion is leasehold and is vested in him. *MacKay* v. *MacKreth*, (1785) 2 Chit. Rep. 461; and see *Smith* v. *Norfolk*, (1631) Cro. Car. 225.

The lessor's personal representative is liable *de bonis testatoris* upon the lessor's express covenants, though the lessor assigned the reversion and the covenant runs with the reversion. See *per* Lord Macnaghten, *Eccles* v. *Mills*, [1898] A. C. 360, 371; considered, *Stuart* v. *Joy*, [1904] 1 K. B. 362; distinguish *Bath* v. *Bowles*, (1905) 93 L. T. 801.

The lessor's heir may sue on a covenant which runs with the reversion if he takes the reversion by descent and the breach was committed since the lessor's death. *Lougher* v. *Williams*, (1673) 2 Lev. 92; *Sale* v. *Kitchingham*, (1713) 10 Mod. 158; *per* Lord Kenyon, *Webb* v. *Russell*, (1789) 3 Term Rep. 393, 401.

The lessor's heir.

This is the case, though the covenant is made with the

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lessor and his executors, not naming the heir. *Lougher* v. *Williams, supra;* see also *Sacheverell* v. *Froggatt,* (1671) 2 Wms. Saund. 751 (ed. 1871).

The heir or devisee is the proper plaintiff to sue for damages sustained since the lessor's death, though the covenant was broken in his lifetime. *Kingdon* v. *Nottle,* (1813) 1 M. & S. 355; (1815) 4 M. & S. 53; *King* v. *Jones,* (1814) 5 Taunt. 418; (1815) 4 M. & S. 188.

Similarly, the heir should sue when there is a continuing breach in the time of the lessor and the heir, but the material breach is in the time of the heir. *Vivian* v. *Champion,* (1705) 2 Lord Raym. 1125; 1 Salk. 141.

The lessor's heir taking the reversion by descent becomes liable on covenants running with the reversion. *Derisley* v. *Custance,* (1790) 4 Term Rep. 75.

The heir may, also, be made liable, to the extent of assets descended to him from the covenantor, in respect of breaches committed by the covenantor of covenants either running with, or collateral to, the land; and for breaches committed after his ancestor's death of such covenants as are collateral. See 2 Platt Leases, 363; 2 Bla. Com. 243, 304 (2nd ed.); Shepp. Touch. 178; *Buckley* v. *Nightingale,* (1725) 1 Stra. 665.

An heir taking as special occupant is in the same position as an heir taking by descent. 2 Platt Leases, 364; 1 Vict. c. 26, sect. 6.

The alienation of the assets by the heir or devisee prevents the creditor following those assets into the hands of a *bonâ fide* alienee, but the heir or devisee becomes personally liable to the extent of the value of the land (11 Geo. IV. & 1 Will. IV. c. 47, sects. 6, 7, 8). *Richardson* v. *Horton,* (1843) 7 Beav. 112; *British Mutual*

Investment Co. v. *Smart*, (1875) L. R. 10 Ch. 567; *Re Hedgely; Small* v. *Hedgely*, (1886) 34 Ch. D. 379.

The Act 11 Geo. IV. & 1 Will. IV. c. 47, only extends to debts or liabilities which accrued in the lifetime of the covenantor. *M'Carthy* v. *Clerke*, (1898) 32 L. R. Ir. 75.

The liability of the heir in respect of assets descended to him now falls in the first place on the lessor's personal representative in whom the lessor's real estate vests under the Land Transfer Act, 1897, sects. 1 and 2.

Under this Act the real estate vests in the executor, though he does not prove the will. *In re Pawley & London and Provincial Bank*, [1900] 1 Ch. 58.

If no executor is appointed, it seems that the legal estate descends to the heir pending a grant of administration. *John* v. *John*, [1898] 2 Ch. 573, 576.

An equitable estate in copyholds devolves on the death of the owner on his personal representative under the Act. *In re Somerville & Turner's Contract*, [1903] 2 Ch. 583.

The proviso in sub-sect. (3) of sect. 2 of the Land Transfer Act, 1897, preserves the order in which assets were applicable towards the payment of debts, &c.

Specialty and simple contract creditors now stand on an equal footing in the administration of an estate; but an executor may prefer a simple contract to a specialty creditor. *In re Samson; Robbins* v. *Alexander*, [1906] 2 Ch. 584.

The lessor's liability on a covenant for quiet enjoyment

On a common form covenant for quiet enjoyment the lessor is only liable for acts of interruption by himself or by persons whom he has expressly or impliedly authorised to do the act. *Williams* v. *Gabriel*, [1906] 1 K. B. 155, 158.

A covenant of this nature relates only to freedom from

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disturbance by adverse claimants, but is not confined to turning the tenant out of possession. It extends to disturbance of occupation by physical interference as distinguishable from disturbance of comfortable enjoyment by noise or the like. See *Jaeger* v. *Mansions Consolidated, Limited*, (1903) 87 L. T. p. 692; see, further, *Tebb* v. *Cave*, [1900] 1 Ch. 642; questioned, *Davis* v. *Town Properties Investment Corporation*, [1903] 1 Ch. 797; see also *Cohen* v. *Tannar*, [1900] 2 Q. B. 609; *Hudson* v. *Cripps*, [1896] 1 Ch. p. 268; *Aldin* v. *Latimer, &c. & Co.*, [1894] 2 Ch. p. 448; *Harrison, Ainslie & Co.* v. *Muncaster*, [1891] 2 Q. B. p. 684; *Robinson* v. *Kilvert*, (1889) 41 Ch. D. p. 96; *Jenkins* v. *Jackson*, (1888) 40 Ch. D. 71; *Sanderson* v. *Mayor of Berwick-on-Tweed*, (1884) 13 Q. B. D. 547.

A lessee who is restrained by injunction at the suit of a vendor in fee from using the demised premises contrary to a restrictive covenant cannot recover damages from the lessor on a covenant for quiet enjoyment contained in the lease. *Dennett* v. *Atherton*, (1872) L. R. 7 Q. B. 316; see also *Jones* v. *Lavington*, [1903] 1 K. B. 253.

Duration of the lessee's liability.

The lessee remains liable on his express covenants, though he has assigned the term (*a*). He is thus answerable for breaches of covenants which run with the land committed after the assignment (*b*). (*a*) *Baynton* v. *Morgan*, (1888) 22 Q. B. D. 74; *Orgill* v. *Kemshead*, (1812) 4 Taunt. 642; 2 Platt Leases, 352; (*b*) *Barnard* v. *Godscall*, (1612) Cro. Jac. 309; *Fisher* v. *Ameers*, 1 Brownl. & Gold. 20.

This liability is not affected by the lessor accepting the assignee as his tenant. *Bacheloure* v. *Gage*, (1630) W. Jo. 223; *Norton* v. *Acklane*, (1640) Cro. Car. 579; *Thursby* v. *Plant*, 1 Wms. Saund. 277, 298 (1871 ed.);

see also *Anon.*, 1 Sid. 447; *Auriol* v. *Mills*, (1790) 4 Term Rep. 94, 98.

He is also liable to assigns of the reversion, though he has assigned the term. *Ashurst* v. *Mingay*, (1680) 2 Show. 133; T. Jo. 144.

Whether the lessee can be sued in covenant upon the reddendum after assignment of the term and acceptance of the assignee, *quære*. See 1 Wms. Saund. 305 (1871 ed.) citing 1 Sid. 447; *Bacheloure* v. *Gage*, (1630) W. Jo. 223; *Auriol* v. *Mills*, (1790) 4 Term Rep. 98; but see 1 Wms. Saund. 305 (*f*) (1871 ed.), and cases there cited.

If the lessee's covenant is absolute, he is liable for the acts and defaults of his underlessee (*a*) or an underlessee of an assign of the term (*b*). (*a*) *Palethorpe* v. *Home Brewery Co., Limited*, [1906] 2 K. B. 5; *Prothero* v. *Bell*, [1906] 22 Times Rep. 370; (*b*) *Mumford* v. *Walker*, (1901) 85 L. T. 518; see also *infra*, p. 49.

It seems that the liability of the lessee is a primary liability to which the doctrines relating to suretyship are not applicable. *Baynton* v. *Morgan*, (1888) 22 Q. B. D. p. 77; but see *Johns* v. *Pink*, [1900] 1 Ch. p. 303; *Moule* v. *Garrett*, (1870) L. R. 5 Ex. 132; *Wolveridge* v. *Steward*, (1833) 1 C. & M. 644, 660; and 1 Wms. Saund. 563 (1871 ed.).

The liability of the lessee is not extinguished by the lessor accepting a surrender of part of the demised premises from an assign of the term. *Baynton* v. *Morgan*, *supra*.

If the lessee becomes bankrupt and his trustee disclaims the lease under sect. 55 of the Bankruptcy Act, 1883, the reversion is accelerated and the liabilities and rights of the lessee are determined. *In re Finley; Ex*

parte Clothworkers' Co., (1888) 21 Q. B. D. p. 485; *Stacey* v. *Hill*, [1901] 1 K. B. 660.

The lessee remains liable upon the covenants in the lease though an assignee of the lease has become bankrupt and his trustee has disclaimed the lease. See Bankruptcy Act, 1883, sect. 55 (2); and *Hill* v. *East and West India Dock Co.*, (1884) L. R. 9 App. Cas. 448; *Harding* v. *Preece*, (1882) 9 Q. B. D. 281; *Smyth* v. *North*, (1872) L. R. 7 Ex. 242, decided under the Act of 1869.

But the lessee is entitled to an express covenant by his assignee to perform and observe the covenants in the lease. *Staines* v. *Morris*, (1812) 1 Ves. & B. 8; *Morley* v. *Clavering*, (1861) 7 Jur. N. S. 904.

The object of this covenant is to protect the lessee against breaches of covenants contained in the lease. It does not enable the lessee to enforce by injunction negative covenants contained in the lease. *Harris* v. *Boots, Cash Chemists (Southern), Limited*, [1904] 2 Ch. 376.

If there is no express covenant the liability of an assignee to indemnify the lessee is limited to the period during which he occupied as assignee. *Wolveridge* v. *Steward*, (1833) 1 C. & M. 644; *Crouch* v. *Tregonning*, (1872) L. R. 7 Ex. 93.

Apart from express contract an assignee of a lease by mesne assignments must indemnify the lessee in respect of breaches of the lessee's covenants committed during his own tenancy (*a*). A sub-lessee of an assignee is under no obligation to indemnify the lessee (*b*). (*a*) *Moule* v. *Garrett*, (1872) L. R. 7 Ex. 101; (*b*) *Bonner* v. *Tottenham and Edmonton Permanent Investment Building Society*, [1899] 1 Q. B. 161.

If assignee No. 1 of a lease becomes bankrupt the

lessee may purchase from the trustee in bankruptcy his right to sue assignee No. 2 upon an express covenant to indemnify assignee No. 1. *In re Perkins; Poyser* v. *Beyfus*, [1898] 2 Ch. 182.

On a transfer of leasehold land under the Land Transfer Acts, a covenant is implied on the part of the transferee with the transferor to perform and observe the covenants in the lease and to keep the transferor indemnified in respect thereof. See sect. 39 (2) of the Act of 1875; L. T. R. 1903, 138, 139.

The lessee's personal representative.

On the death of the lessee the term vests in his personal representative, who can sue the lessor and his real and personal representatives in the same manner as the lessee could. He can sue assigns of the reversion under sect. 2 of 32 Hen. VIII. c. 34.

He cannot accept the representation of the lessee and waive the term. See *Rubery* v. *Stevens*, (1832) 4 B. & Ad. 241, 244; *Doe* d. *Wyatt* v. *Stagg*, (1839) 7 Scott, 690, 694.

The personal representative is chargeable in respect of the lessee's express covenants so long as he has assets. *Coghil* v. *Freelove*, (1690) 3 Mod. 325; *Helier* v. *Casebert*, (1664) 1 Lev. 127; *S. C.* 1 Sid. 240, 266; *Pitcher* v. *Tovey*, (1691) 4 Mod. 71, 76; (1692) 12 Mod. 23.

He cannot get rid of this liability by assigning the term. *Helier* v. *Casebert, supra; Coghil* v. *Freelove, supra.*

He is liable, also, though the lessee assigned the term in his lifetime. *Coghil* v. *Freelove, supra*, 327; *Brett* v. *Cumberland*, (1619) Cro. Jac. 521, 522; *Wilkins* v. *Fry*, (1816) 1 Meriv. 244, 265; 1 Wms. Saund. 303; note (10) to *Thursby* v. *Plant* (1871 ed.).

The personal representative remains liable on the lessee's express covenants though the lessor has accepted

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the assignee as his tenant. *Auriol* v. *Mills*, (1790) 4 Term Rep. 94, 98; 1 Wms. Saund. 305; note (10) to *Thursby* v. *Plant* (1871 ed.); but see *Mayor of Swansea* v. *Thomas*, (1882) 10 Q. B. D. p. 50.

The liability is the same when the action is brought by an assign of the reversion. *Brett* v. *Cumberland*, (1618) Cro. Jac. 521, 522.

The liability of the personal representative of the lessee and an assign of the term on covenants running with the land is concurrent; but the lessor can have only one satisfaction. *Ib.* 523.

It is enacted by the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), sect. 27, that—

"Where an executor or administrator, liable as such to the rents, covenants or agreements, contained in any lease or agreement for a lease granted or assigned to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease as may have accrued due and been claimed up to the time of the assignment hereinafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease or agreement for a lease to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part, or any further part (as the case may be), of the personal estate of the deceased to meet any future liability under the said lease or agreement for a

lease; and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease; but nothing herein contained shall prejudice the right of the lessor or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed."

This section applies only to a case where there has been an assignment by executors to a purchaser. See *per* Byrne, J., *In re Nixon; Gray* v. *Bell*, [1904] 1 Ch. p. 644.

An executor who has assented unconditionally to a specific bequest of leaseholds, is not entitled to an indemnity out of the testator's general estate in respect of covenants contained in the lease. *Shadbolt* v. *Woodfall*, (1845) 2 Coll. C. C. 30; *Hickling* v. *Boyer*, (1851) 3 Mac. & G. p. 646; *Smith* v. *Smith*, (1861) 1 Dr. & Sm. p. 387.

But a personal representative who has placed all the circumstances before the Court in an administration action, and acts under its order, will be protected against all existing and future liabilities. *Waller* v. *Barrett*, (1857) 24 Beav. 413; *Dodson* v. *Sammell*, (1861) 1 Dr. & Sm. 575, 577; *Ross* v. *Tatham*, (1869) 17 W. R. 960; *Buckley* v. *Nesbitt*, (1880) 5 L. R. Ir. 199.

The Court will not set aside assets to indemnify the executors against possible liability in respect of leases held by the testator, unless there is privity of estate between the executors and the lessors. *In re Nixon*, [1904] 1 Ch. 638.

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A lessor is not entitled to have assets of a deceased lessee impounded to answer future possible breaches of covenants in the lease. *King* v. *Malcott*, (1852) 9 Hare, 692; 16 Jur. 237.

If the executor takes possession of the demised property he is chargeable personally as an assign of the lease. *Rendall* v. *Andreæ*, (1892) 61 L. J. Q. B. 630; *In re Bowes*, (1887) 37 Ch. D. 128; *Rubery* v. *Stevens*, (1832) 4 B. & Ad. 241, 244; notes to *Dean and Chapter of Bristol* v. *Guyse*, (1667) 1 Wms. Saund. 124 (1871 ed.).

The entry of one of two executors does not enure as the entry of both so as to make them jointly liable. *Nation* v. *Tozer*, (1834) 1 C. M. & R. 172.

It seems that the occupation of a tenant to whom the executor has let the property is the occupation of the executor. See *Bull* v. *Sibbs*, (1799) 8 Term Rep. 327.

An executor who is sued personally on the covenant for payment of rent may by proper pleading limit his liability to the yearly value of the premises. *Rendall* v. *Andreæ*, (1892) 61 L. J. Q. B. 630; *In re Bowes*, (1887) 37 Ch. D. 128; *Billinghurst* v. *Speerman*, (1695) 1 Salk. 297.

As to the form of plea. See *In re Bowes*, *supra*, 132.

But, apparently, he cannot do this when he is sued on the lessee's covenant to repair. *Rendall* v. *Andreæ*, *supra*; *Sleap* v. *Newman*, (1862) 12 C. B. N. S. 116; *Tremeere* v. *Morison*, (1834) 1 Bing. N. C. 89; *Tilney* v. *Norris*, (1700) 1 Lord Raym. 553.

It seems that an offer to surrender the lease, if promptly made, may help an executor in respect of dilapidations subsequent to the offer. *Reid* v. *Lord Tenterden*, (1833) 4 Tyr. 111, 120.

An executor who has entered is liable *de bonis propriis*

to the extent to which he might by the exercise of reasonable diligence have made a profit from the premises (*a*). If the lease contains a covenant to repair he cannot rely on a reduction in value by the want of repairs in his own time. Nor is the value as between the plaintiff and defendant affected by the non-payment of rent by an underlessee (*b*). (*a*) *Hopwood* v. *Whaley*, (1848) 6 C. B. 744; *In re Bowes*, (1887) 37 Ch. D. p. 132; (*b*) *Hornidge* v. *Wilson*, (1840) 11 A. & E. 645.

An executor who has entered into possession may avoid future liability as an assign by assigning the lease. *Goodland* v. *Ewing*, (1883) 1 Cab. & E. 43.

A premium received by the executor upon the assignment is not specifically charged to the landlord for rent accrued due after the assignment. *Ib.*

The lessee's heir, in respect of assets descended to him from the lessee, is subject to similar liabilities to those of the lessor's heir. Considered *supra*, p. 32.

The lessee's heir and devisee.

The Act 11 Geo. IV. & 1 Will. IV. c. 47, does not enable an assignee of the lessor to sue the devisee of the devisee of the lessee for rent becoming due after the lessee's death. *M'Carthy* v. *Clerke*, (1893) 32 L. R. Ir. 75.

(ii.) *The Nature of the Assignment.*

A legal assignment necessary.

The assignment may be by act of the parties or by act of law. But a legal assignment of the lease is necessary to transfer to assigns the covenants in the lease which run with the land. The lessor cannot sue an equitable assign in equity (*a*). Nor can an equitable assign sue the lessor (*b*). (*a*) *West* v. *Dobb*, (1869) L. R. 4 Q. B. 634; *Cox* v. *Bishop*, (1857) 8 D. M. & G. 815; *Robinson* v. *Rosher*, (1841) 1 Y. & C. C. C. 7; *cf. Bagot Pneumatic*

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Tyre Co. v. *Clipper Pneumatic Tyre Co.*, [1902] 1 Ch. p. 156; (*b*) *Friary Holroyd & Healey's Breweries, Limited* v. *Singleton*, [1899] 1 Ch. 86; 2 Ch. 261.

This rule has not been changed by the Judicature Act, 1873, sect. 24, sub-sect. 4. See *Gentle* v. *Faulkner*, [1900] 2 Q. B. 274.

Moreover, the lessor cannot compel an equitable assignee to take a legal assignment. *Moore* v. *Greg*, (1848) 2 Phil. 717; *Moores* v. *Choat*, (1839) 8 Sim. 508, 523.

The devisee of an equity of redemption was not liable in covenant as assignee of the original covenantor. *Mayor of Carlisle* v. *Blamire*, (1807) 8 East, 487.

If there is no legal assignment, a person in possession does not by virtue of the Statute of Limitations become liable on the covenants in the lease. *Tichborne* v. *Weir*, (1892) 67 L. T. 735; *O'Connor* v. *Foley*, [1905] 1 Ir. R. 1; distinguished, *In re Nisbet & Pott's Contract*, [1905] 1 Ch. 391, 399, affirmed; [1906] 1 Ch. 386.

Similarly, when a lease is taken by a trustee, the *cestui que trust* is not liable on the covenants. *Ramage* v. *Womack*, [1900] 1 Q. B. 116.

An equitable tenant for life of the benefit of a lease who enters into possession in that character does not become liable to the landlord, as assignee, in respect of the covenants in the lease. *Arkwright* v. *Colt*, (1842) 2 Y. & C. C. C. 4, 8.

An equitable tenant for life of leaseholds is bound to perform the covenants in the lease, as between himself and the testator's estate (*a*), and as between himself and the remainderman under a settlement (*b*). But an equitable tenant for life under a will is not liable in respect of breaches committed in the testator's

lifetime (*c*). (*a*) *In re Gjers*, [1899] 2 Ch. 54; *In re Betty*, [1899] 1 Ch. 821; (*b*) *In re Waldron & Bogue's Contract*, [1904] 1 Ir. R. 240; distinguish *In re Parry & Hopkins*, [1900] 1 Ch. 160; (*c*) *In re Betty*, *supra*.

An equitable assignee of a lease is liable at the suit of the lessee for breaches of covenant committed during his possession. *Close* v. *Wilberforce*, (1838) 1 Beav. 112.

Proceedings for equitable relief by way of injunction may be maintained against equitable assignees of the reversion. See *Jaeger* v. *Mansions Consolidated, Limited*, (1903) 87 L. T. p. 696.

Underlease for the whole term.

If a lessee underlets for the whole residue of his term and the underlease is by deed it amounts to an assignment of the lease. *Pluck* v. *Digges*, (1831) 5 Bligh N. S. 31; *Beardman* v. *Wilson*, (1868) L. R. 4 C. P. 57; *Langford* v. *Selmes*, (1857) 3 K. & J. 220, 227; *Wollaston* v. *Hakewill*, (1841) 3 Scott N. R. 593.

In the case of a sub-demise for a term exceeding that of the lease by a lessee who had a lease and a reversionary lease, it was held that the lessee had no reversion; for the reversionary lease only created an *interesse termini* until entry thereunder. *Lewis* v. *Baker*, [1905] 1 Ch. 46.

When a lessee grants the residue of his term to a sub-lessee from the expiration of the sub-lease, the sub-lease does not merge. It seems, therefore, that the covenants in the sub-lease are still enforceable. *Hyde* v. *Warden*, (1877) 3 Ex. D. 72.

A sub-lease may operate as an assignment though it contains a reservation in favour of the lessee. See *Palmer* v. *Edwards*, (1783) 1 Dougl. 187, n.

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But a sub-demise by parol has been supported as a sub-demise, though it was for the residue of the lessee's term. *Pollock* v. *Stacy*, (1847) 9 Q. B. 1033; considered, *Beardman* v. *Wilson*, (1868) L. R. 4 C. P. 57.

(iii.) *Assigns of the Term.*

Covenants run with the land at common law.

Covenants run with the land, as distinguished from the reversion, at common law. Thus, at common law, assigns of the term can sue the lessor on covenants which run with the land; and are liable to be sued by him. Their rights and liability in respect of assigns of the reversion are conferred by the statute 32 Hen. VIII. c. 34. See *infra*, p. 53.

Entry of the assign.

The assign of the term takes the estate which is assigned to him by acceptance of the assignment and becomes liable on covenants running with the land without entry. *Williams* v. *Bosanquet*, (1819) 1 Br. & B. 238.

The meaning of "assign."

The word "assigns" comprehends "all those who take either immediately or remotely from or under the assignor by conveyance, devise, descent, or act of law." See *Baily* v. *De Crespigny*, (1869) L. R. 4 Q. B. 186, citing *Spencer's Case*, (1582) 5 Rep. 16a.

Thus an executor of an assign is an assign. *Spencer's Case*, *supra*, 7th Resolution; *Wollaston* v. *Hakewill*, (1841) 3 Scott N. R. 593, 614; see also *supra*, p. 38.

An executor *de son tort* in possession of lands held by the deceased for an unexpired term of years may be sued as an assign. *Williams* v. *Heales*, (1874) L. R. 9 C. P. 177; *Fielding* v. *Cronin*, (1885) 16 L. R. Ir. 379; *Hunt* v. *Archer*, (1886) 31 Sol. J. 27.

But a person who takes under an executor *de son tort*

does not become himself, by so doing, an executor *de son tort* and chargeable as an assign. *Paull* v. *Simpson*, (1846) 15 L. J. Q. B. 382.

Assigns of an executor or administrator are assigns. *Spencer's Case, supra.*

A mortgagee by assignment of the term is an assign. *Williams* v. *Bosanquet*, (1819) 1 Br. & B. 288.

Also, a purchaser of a lease sold by force of an execution. *Spencer's Case, supra*, 5th Resolution.

A tenant by elegit of a term of years has the whole term vested in him; but he is not bound to indemnify the lessee against the rent. *Johns* v. *Pink*, [1900] 1 Ch. 296.

An underlessee is not an assign of the term (*a*); and has no equity to compel performance of a lessor's covenant (*b*). (*a*) *Holford* v. *Hatch*, (1779) 1 Dougl. 183; *Earl of Derby* v. *Taylor*, (1801) 1 East, 502; *Bryant* v. *Hancock & Co.*, [1898] 1 Q. B. 716; affirmed, [1899] A. C. 442; *Villiers* v. *Oldcorn*, (1903) 20 Times Rep. 11; (*b*) *South of England, &c.* v. *Baker*, [1906] 2 Ch. 631.

Thus, a mortgagee of leaseholds by sub-demise is not liable to the head lessor on covenants to pay rent and repair, &c. Nor is a receiver appointed by the Court in a mortgagee's action to enforce the security. *Hand* v. *Blow*, [1901] 2 Ch. 721.

An underlessee is not usually bound by the original stipulations as to assignment in the lease. *Williamson* v. *Williamson*, (1874) L. R. 9 Ch. 729; *Villiers* v. *Oldcorn*, (1903) 20 Times Report, 11.

Similarly, underletting is not considered a breach of a covenant not to assign (*a*), and an assignment of the term is not within a covenant against underletting (*b*). (*a*) See *Villiers* v. *Oldcorn, supra; Taite* v. *Gosling*, (1879) 11 Ch. D. 277; (*b*) *In re Doyle & O'Hara's Contract*,

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[1899] 1 Ir. R. 113; distinguish *Greenaway* v. *Adams*, (1806) 12 Ves. 395.

A covenant not to assign applies to a reassignment to the original lessee. *McEacharn* v. *Colton*, [1902] A. C. 104.

But a grant of a licence which confers no interest in the property is not within a covenant not to assign without consent. *Edwardes* v. *Barrington*, (1901) 85 L. T. 650.

Covenants of this nature are construed strictly. A covenant not to part with the possession of the premises does not restrain the tenant from parting with part of the premises. See *Grove* v. *Portal*, [1902] 1 Ch. 727.

Trustee in bankruptcy.

A trustee in bankruptcy is liable as an assign as from the date of his appointment upon covenants in a lease held by the bankrupt, which run with the land, unless he disclaims the lease. See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), sects. 54, 55; *Titterton* v. *Cooper*, (1882) 9 Q. B. D. 473.

The leave of the Court must be obtained by the trustee to disclaim a lease except in cases provided by the Bankruptcy Rules, 1886 and 1890, rule 320. The power of the Court to grant leave to disclaim is discretionary. Sect. 55 (3) of the Bankruptcy Act, 1883; see also *Re Wilson*, (1871) L. R. 13 Eq. 186; *Ex parte East and West India Dock Co.; In re Clarke*, (1881) 17 Ch. D. 759.

A trustee appointed under the Bankruptcy Act, 1883, sect. 21, sub-sect. (1) or (6), must disclaim within a year from the date of the certificate of his appointment. No limit is placed upon the time for disclaimer while the official receiver is trustee, but he may be required by any person interested in the bankrupt's onerous property

to decide whether he will disclaim or not. *In re Cohen*, [1905] 2 K. B. 704.

If a mortgagee prevents the trustee from disclaiming the lease and takes an assignment of it he must covenant to indemnify the lessee against liability under the lease. *Ex parte Buxton*, (1880) 15 Ch. D. 289.

By sect. 55 (2), "The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person."

It was held under sect. 23 of the Act of 1869 that the term was not destroyed if the trustee in bankruptcy of an assignee of the lease disclaimed. *Hill* v. *East and West India Dock Co.* (1884) L. R. 9 App. Cas. 448; see now sect. 55 (2) of the Act of 1883; see also *supra*, p. 36.

The Court may, under sect. 55 (6), on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by the Act in respect of any disclaimed property, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just.

A mortgagee or underlessee can, as a rule, only obtain a vesting order under sect. 55 (6) of the Bankruptcy Act, 1883, subject to the same liabilities and obligations

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as the bankrupt was subject to. But under sect. 13 of the Bankruptcy Act, 1890, a vesting order may be made subject only to the same liabilities and obligations as if the lease had been assigned to the person taking the vesting order at the date when the bankruptcy petition was filed. A mortgagee or underlessee is not entitled to an order under this section except in cases of hardship. *In re William Walker*, (1895) 2 Manson, 60; *In re Carter & Ellis; Ex parte Savill Brothers*, [1905] 1 K. B. 735.

The lessor, under sect. 55 (6), may put a mortgagee to his election to accept a vesting order or be excluded from all interest in the property. *In re Baker*, [1901] 2 K. B. 628; *In re Finley*, (1888) 21 Q. B. D. 475; *In re Cock*, (1887) 20 Q. B. D. 343.

Moreover, a mortgagee by sub-demise cannot get rid of this liability by transferring the mortgage to a trustee for himself. Such an assignment is void, as between the mortgagee and the landlord. *In re Smith; Ex parte Hepburn & Co.*, (1890) 7 Morrell, 246; 25 Q. B. D. 536.

The right of disclaimer conferred on trustees by sect. 55 extends to any property, as defined by sect. 168, from which no benefit can accrue to the bankrupt's estate. *In re Maughan; Ex parte Monkhouse*, (1885) 14 Q. B. D. 956.

The equity of redemption in a term of years which the bankrupt has assigned by way of mortgage before the bankruptcy is not property burdened with onerous covenants within the meaning of sect. 55. *In re Gee; Ex parte The Official Receiver*, (1889) 24 Q. B. D. 65.

Whether sect. 55 enables a trustee to disclaim the bankrupt's after-acquired leasehold property, *quære*. See *In re Clayton & Barclay's Contract*, [1895] 2 Ch. 212.

It was held under the Act of 1869 that the trustee could not disclaim part of the demised property and keep the rest. *Ex parte Allen; In re Fussell*, (1882) 20 Ch. D. 341, 346.

The provisions of sect. 55 are applicable to administrations in bankruptcy, under sect. 125, of the estates of persons dying insolvent. *In re Mellison; Ex parte Day*, [1906] 2 K. B. 68.

In *Stein* v. *Pope*, [1902] 1 K. B. 595, lessors recovered rent from an assignee of a lease after the bankruptcy of the lessee, though the assignment was an act of bankruptcy, and as such void *ab initio*.

If the trustee does not disclaim he does not become liable for any rent which accrued due before his appointment. *Titterton* v. *Cooper*, (1882) 9 Q. B. D. 473; *Stein* v. *Pope*, [1902] 1 K. B. p. 599.

Liability of assigns of the lease for breaches of covenant by an underlessee.

It is a question of construction whether an assign of the term is liable for breaches of a lessee's covenant by an underlessee. If the covenant is absolute and runs with the land assigns of the term are liable (*a*); but where the covenant was not to suffer (*b*) or wilfully suffer (*c*) an act to be done, it was held that assigns of the term were not liable for the acts of sub-lessees. (*a*) *Mumford* v. *Walker*, (1901) 85 L. T. 518; (*b*) *Wilson* v. *Twamley*, [1904] 2 K. B. 99; (*c*) *Bryant* v. *Hancock & Co.*, [1898] 1 Q. B. 716, 721; [1899] A. C. 442, 445; see also *supra*, p. 35.

Severance of the term.

An assignee of part of the demised premises may sue (*a*), and be sued (*b*), on covenants which run with the land. (*a*) *Simpson* v. *Clayton*, (1838) 4 Bing. N. C. 758, 780; (*b*) *Stevenson* v. *Lambard*, (1802) 2 East, 575; *Bally* v. *Wells*, (1769) Wilmot, 346; *Congham* v. *King*, (1631) Cro. Car. 222.

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An assignee of part of the demised premises may sue assigns of the reversion. See *Palmer* v. *Edwards*, (1783) 1 Dougl. 186, n.

Tenants in common, having separate and distinct interests in the term, may sue separately in respect of damages which are in their nature severable, and may be apportioned according to the value of the share of each. See *Simpson* v. *Clayton*, *supra*, p. 781.

It appears from cases decided upon the form of pleadings that if the lease is assigned to joint tenants or tenants in common each is liable on covenants which run with the land; but if one is sued alone he may require another to be joined. Formerly he must plead the non-joinder of a co-tenant in abatement; his remedy is now to apply under Order XVI. r. 12, to have him joined as a defendant. See *Merceron* v. *Dowson*, (1826) 5 B. & C. 479; *Heap* v. *Livingston*, (1843) 11 M. & W. 896; *Shee* v. *Gray*, (1864) 15 Ir. C. L. Rep. 296; *Grattan* v. *Wall*, (1868) Ir. R. 2 C. L. 484; note (*a*) to *Devereux* v. *Barlow*, (1669) 2 Wms. Saund. 539 (1871 ed.).

If demised premises became vested in several persons in separate divided portions one of them was not liable either in debt (*a*) or covenant (*b*) as assignee of all the estate of the original lessee. (*a*) *Curtis* v. *Spitty*, (1835) 1 Bing. N. C. 756; followed, (*b*) *Orme* v. *Wills*, (1878) 2 L. R. Ir. 124.

Duration of the liability and rights of assigns.

Privity of estate is the foundation of an assign's rights and liability on covenants which run with the land. *Paul* v. *Nurse*, (1828) 8 B. & C. 486; 2 Man. & Ry. 525; *Fagg* v. *Dobie*, (1838) 3 Y. & C. 96, 103; *Taylor* v. *Shum*, (1797) 1 Bos. & P. 21.

Accordingly an assign of the term is not liable for breaches of covenant which took place before the

assignment to him. *Grescot* v. *Green*, (1700) 1 Salk. 198; *Churchwardens of St. Saviour's, Southwark* v. *Smith*, (1762) 3 Burr. 1271.

He can, also, get rid of future liability by assigning over. *Pitcher* v. *Tovey*, (1691) 4 Mod. 71; *Taylor* v. *Shum*, (1797) 1 Bos. & P. 21; *Lekrux* v. *Nash*, (1745) 2 Str. 1221; *Odell* v. *Wake*, (1813) 3 Camp. 394; *Onslow* v. *Corrie*, (1817) 2 Madd. 330; *Paul* v. *Nurse*, (1828) 8 B. & C. 486; 2 Man. & Ry. 526.

An assignee of a lease who has assigned over is discharged from the covenant to pay rent before the entry of his assignee. *Walker* v. *Reeve*, (1781) 3 Dougl. 19.

A trustee in bankruptcy may relieve himself from liability in this way. *Hopkinson* v. *Lovering*, (1883) 11 Q. B .D. 92; see also *In re Johnson* v. *Stephens*, (1894) 1 Manson, 54.

If the rent is greater than the value of the property, executors who neglect to assign the lease may be liable to make good the loss incurred by their testator's estate. *Rowley* v. *Adams*, (1839) 4 Myl. & C. 534.

But an assign of the lease is liable for breaches of covenant committed during his tenancy though he assigned over before the action was commenced. *Harley* v. *King*, (1835) 5 Tyrw. 692; *Treackle* v. *Coke*, (1683) 1 Vern. 165.

Similarly, he is liable for breaches committed in his own time though the term has expired. *Ib.* 1 Wms. Saund. 306 (1871 ed.).

If the assignee covenants with his assignor to indemnify him in respect of breaches of the lessee's covenants, it is to be determined upon the construction of the covenant whether the liability to indemnify extends to a breach of covenant which existed before

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the assignment. See *Gooch* v. *Clutterbuck*, [1899] 2 Q. B. 148.

If there has been a complete breach of a lessor's covenant and the ultimate damage resulting from it has been sustained before an assignment of the lease, the right of action for this breach does not pass to the assignee. *Doyle* v. *Hort*, (1878) 4 L. R. Ir. 455.

Assignment by compulsion of law.

If leaseholds are taken by a railway company under statutory powers, the company must accept an assignment of the lease containing the usual covenants. *Harding* v. *Metropolitan Railway Co.*, (1872) L. R. 7 Ch. 154; see also *In re Cary-Elwes' Contract*, [1906] 2 Ch. 143.

Any necessity for the consent of the lessor to an assignment is done away with by the Lands Clauses Consolidation Act. *Slipper* v. *Tottenham and Hampstead Junction Railway Co.*, (1867) L. R. 4 Eq. 112; see also *Legg* v. *Belfast, &c., Railway Co.*, (1850) 1 Ir. C. L. R. 124, n.

The lessee is liable in respect of breaches of covenant committed after the notice to treat but before the assignment. *Mills* v. *East London Union*, (1872) L. R. 8 C. P. 79; 27 L. T. 557.

Incorporeal hereditaments.

Covenants in a lease of an incorporeal hereditament will run with the thing demised. See *Bally* v. *Wells*, (1769) 3 Wils. 25; Wilmot, 341; *Earl of Portmore* v. *Bunn*, (1823) 1 B. & C. 694; considered, Platt Covenants, 539; *Earl of Egremont* v. *Keene*, (1837) 2 Jones (Ex. Ir.) 307; *Norval* v. *Pascoe*, (1864) 34 L. J. Ch. 82.

Lease to a married woman.

As to covenants in a lease to a married woman. See *Sutherland* v. *Sutherland*, [1893] 3 Ch. 169, 184.

(iv.) *Assigns of the Reversion.*

32 Hen. VIII. c. 34.

At common law neither the benefit nor burden of express covenants run with the reversion. The right to sue and be sued on covenants in the lease was first given to assigns of the reversion by the statute 32 Hen. VIII. c. 34. See the recitals to the statute; notes to *Thursby* v. *Plant*, 1 Wms. Saund. 299, 300 (1871 ed.); *Eccles* v. *Mills*, [1898] A. C. 370.

But the action of debt for rent lay for the assignee of the reversion at common law. 1 Wms. Saund. 308 (1871 ed.).

By the statute 32 Hen. VIII. c. 34, it is enacted "that as well all and every person and persons, and bodies politic, their heirs, successors and assigns, which have or shall have any gift or grant of our said sovereign lord by his letters patents of any lordships, manors, lands, tenements, rents, parsonages, tithes, portions, or any other hereditaments, or of any reversion or reversions of the same, which did belong or appertain to any of the said monasteries, and other religious and ecclesiastical houses, dissolved, suppressed, relinquished, forfeited, or by any other means come to the King's hands since the said fourth day of February, the seven-and-twentieth year of his most noble reign, or which at any time heretofore did belong or appertain to any other person or persons, and after came to the hands of our said sovereign lord, as also all other persons being grantees or assignees to or by our said sovereign lord the King, or to or by any other person or persons than the King's Highness, and the heirs, executors, successors and assigns of every of them, shall and may have and enjoy like advantages against the lessees, their executors, administrators and assigns,

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by entry for non-payment of the rent, or for doing of waste or other forfeiture; and also shall and may have and enjoy all and every such like, and the same advantage, benefit and remedies by action only, for not performing of other conditions, covenants or agreements contained and expressed in the indentures of their said leases, demises, or grants, against all and every the said lessees and farmers and grantees, their executors, administrators and assigns, as the said lessors or grantors themselves, or their heirs or successors, ought, should, or might have had and enjoyed at any time or times, in like manner and form, as if the reversion of such lands, tenements or hereditaments had not come to the hands of our said sovereign lord, or as our said sovereign lord, his heirs and successors, should or might have had and enjoyed in certain cases, by virtue of the Act made at the first session of this present Parliament, if no such grant by letters patents had been made by his Highness."

"II. Moreover be it enacted by authority aforesaid, that all farmers, lessees and grantees of lordships, manors, lands, tenements, rents, parsonages, tithes, portions, or any other hereditaments for term of years, life or lives, their executors, administrators and assigns, shall and may have like action, advantage and remedy against all and every person and persons and bodies politic, their heirs, successors and assigns, which have or shall have any gift or grant of the King our sovereign lord, or of any other person or persons, of the reversion of the same manors, lands, tenements, and other hereditaments so letten, or any parcel thereof, for any condition, covenant or agreement contained or expressed in the indentures of their lease and leases, as the same lessees, or any of them might and should have had against the said lessors

and grantors, their heirs and successors; all benefits and advantages of recoveries in value, by reason of any warranty in deed or in law by voucher or otherwise only excepted."

As to the effect of the Act in transferring the privity of contract from reversioner to reversioner. See *Stuart* v. *Joy*, [1904] 1 K. B. 367; *Bickford* v. *Parson*, (1848) 5 C. B. 930; 1 Wms. Saund. 306, note (11) (1871 ed.).

When the Act applies.

If the demise is not by deed the Act does not apply. *Brydges* v. *Lewis*, (1842) 3 Q. B. 603; *Standen* v. *Chrismas*, (1847) 10 Q. B. 135; *Smith* v. *Eggington*, (1874) L. R. 9 C. P. 145.

But the landlord's assigns may in some cases sue the tenant upon a new contract of tenancy. When rent has been paid either by the successor of the tenant to the landlord, or by the tenant to the successor of the landlord, and received without objection, a jury may infer from such payment, and from the fact of notice to quit not being given, a consent to go on on the same terms as before; and a conventional law is thus made equivalent to that of Henry VIII. in the case of leases under seal. *Cornish* v. *Stubbs*, (1870) L. R. 5 C. P. p. 339; *Buckworth* v. *Simpson*, (1835) 1 C. M. & R. 834; *Brydges* v. *Lewis*, (1842) 3 Q. B. 603; *Standen* v. *Chrismas* (1847) 10 Q. B. p. 142; *Arden* v. *Sullivan*, (1850) 19 L. J. Q. B. 268; *Smith* v. *Eggington*, (1874) L. R. 9 C. P. 145; *Wyatt* v. *Cole*, (1877) 36 L. T. 613; *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. p. 615.

The Act extends only to such covenants as touch or concern the thing demised, and has no operation on collateral covenants. *Spencer's Case*, (1582) 5 Rep. 16a; Co. Litt. 215b; *Easterby* v. *Sampson*, (1830) 6 Bing. 652.

It does not apply where the covenant relates to a thing

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not *in esse*, and "assigns" are not expressed to be bound. See *per* Romer, L.J., *Woodall* v. *Clifton*, [1905] 2 Ch. p. 278; *Doughty* v. *Bowman*, (1848) 11 Q. B. 444, 454.

Moreover, so far as a covenant is personal or collateral is does not run with the reversion, *e.g.*, a lessor's covenant for quiet enjoyment imposes no obligation upon assigns of the reversion as to the user of adjoining land held by them under another title. And it seems that the covenant does not cover user by the lessor of land subsequently acquired by him. See *Davis* v. *Town Properties Investment Corporation, Limited*, [1903] 1 Ch. p. 804.

The Act does not apply to covenants upon estates in fee or in tail, but only upon leases made for life or years. *Lewes* v. *Ridge*, (1601) Cro. Eliz. 863.

The Act 32 Hen. VIII. c. 34 does not apply unless the covenant is made by or with the legal reversioner. See *Webb* v. *Russell*, (1789) 3 Term Rep. 393; *Stokes* v. *Russell*, (1790) 3 Term Rep. 678; (1791) 1 H. Bl. 562; *Thwaites* v. *M'Donough*, (1839) 2 Ir. Eq. R. 97; *per* Farwell, J., *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 613; *Whitton* v. *Peacock*, (1834) 3 My. & K. 336; (1835) 2 Bing. N. C. 411.

Before the Judicature Acts if a lessee came into a Court of Equity to compel specific execution of a covenant in his lease as running with the reversion, to found the jurisdiction of equity, he must show that the defendant was personally liable at law in respect of the covenant, and of his estate in the land. Because in this case, equity followed the law, and acted only in aid of it. *Duchess of Chandos* v. *Brownlow*, (1791) 2 Ridgw. P. C. p. 416.

Similarly, before the Judicature Act, 1873, a mortgagor

in possession was not entitled to say that he had the legal reversion which would entitle him to sue on the covenants of a lease created before the mortgage. *Matthews* v. *Usher*, [1900] 2 Q. B. p. 539; *Molyneux* v. *Richard*, [1906] 1 Ch. p. 43.

It seems that this rule has not been altered by the Judicature Acts. See *Matthews* v. *Usher*, *supra*; *Joseph* v. *Lyons*, (1884) 15 Q. B. D. 285; *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 617.

4 Anne, c. 16, sect. 9.

The grant of the reversion is effectual without attornment of the tenant by virtue of 4 Anne, c. 16, sect. 9. See *Allcock* v. *Moorhouse*, (1882) 9 Q. B. D. 366.

Notice of the assignment is not necessary before advantage can be taken by the assignee of a breach of covenant to repair. *Scaltock* v. *Harston*, (1875) 1 C. P. D. 106.

The meaning of "assigns."

The word "assigns" has the same meaning in sections 1 and 2 of the Act. See *Twynam* v. *Pickard*, (1818) 2 B. & Ald. 110.

A devisee of the reversion is an assign within the Act. *Machel & Danton's Case*, (1587) 2 Leon. 33; Ow. 54, 91; see also *Roe* d. *Bamford* v. *Hayley*, (1810) 12 East, 464; *Sampson* v. *Easterby*, (1829) 9 B. & C. 505; (1830) 6 Bing. 644.

In the case of a devise of copyholds the estate descends to the heir until admittance of the devisee. *Reg.* v. *Garland*, (1870) L. R. 5 Q. B. 269; *Garland* v. *Mead*, (1871) L. R. 6 Q. B. 441; —— d. *Jefferies* v. ——, (1754) 1 Ken. 110.

But an admittance may be implied from acceptance of rent by the lord. *Ecclesiastical Commissioners* v. *Parr*, [1894] 2 Q. B. 420.

A tenant by the curtesy, or any other who comes in in

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the post, or paramount the person limiting, is not an assign (*a*). But every one who comes in by act and limitation of the party, though in the post, is a sufficient grantee within the statute 32 Hen. VIII. (*b*). (*a*) *Spencer's Case*, (1582) 5 Rep. 16a, 5th Resolution; Shepp. Touch. 222; 4 Leon. 29; (*b*) Platt Covenants, 542; Co. Litt. 215b., Moore, 98.

As to a person claiming the reversion under a conveyance to uses. See Gilbert Uses and Trusts, 185, n. (3rd ed.) 1 Saund. Uses 121 (5th ed.).

A surrenderee of copyholds is within the Act. *Glover* v. *Cope*, (1691) 3 Lev. 326; *Whitton* v. *Peacock*, (1834) 3 My. & K. 325; see also the Conveyancing Act, 1881, sects. 2 (ii.), 10 and 11.

But until a surrenderee has been admitted he has not in equity the legal estate, and in a Court of law is a mere stranger. *Cf. Rayson* v. *Adcock*, (1863) 7 L. T. N. S. 747; 9 Jur. N. S. 800.

If a mortgagee demises the mortgaged property with the concurrence of the mortgagor and the lessee covenants with the mortgagee to pay the rent to the mortgagee and his assigns till satisfaction of the mortgage debt, assigns of the mortgagee can sue on the covenant. See *Whitaker* v. *Harrold*, (1847) 17 L. J. Q. B. 343.

It seems that a mortgagee of the reversion can enforce a lessee's covenant which runs with the reversion, though he has not attempted to realise his security. *Molyneux* v. *Richard*, [1906] 1 Ch. p. 42.

The trustee of a bankrupt tenant in tail has power to recover rents and profits and enforce the observance of covenants, conditions, and agreements under 46 & 47 Vict. c. 52, sect. 56 (5); and 3 & 4 Will. IV. c. 74, sect. 67.

Lease made under a power in a settlement.

If a lease is made in exercise of a power contained in a settlement, the lease takes effect out of the settled land, and the benefit of the lessee's covenants follows the limitations of the settlement, and those entitled in remainder under the settlement are assigns within the Act and can sue on covenants which run with the reversion. Sugden Powers (8th ed. 722); *Isherwood* v. *Oldknow*, (1815) 3 M. & S. 382; but see *Yellowly* v. *Gower*, (1855) 11 Ex. 274; considered, Davidson Prec., Vol. III., Part I. 497.

There appears to be no decision that the burden of the lessor's covenants devolves in this manner under 32 Hen. VIII. c. 34. Davidson Prec., Vol. III., Part I. 495; see also sects. 10 and 11 of the Conveyancing Act, 1881, *infra*, p. 66.

Right of re-entry.

Under 32 Hen. VIII. c. 34, a right of re-entry runs with the reversion in the same manner as a covenant. *Greenaway* v. *Hart*, (1854) 14 C. B. 340; *Hotley* v. *Scot*, (1772) Lofft, 316; see, further, the Conveyancing Act, 1881, sect. 10.

A proviso for re-entry on non-performance of the covenants in a lease may apply to negative covenants. *Harman* v. *Ainslie*, [1904] 1 K. B. 698.

Duration of the rights of assigns.

An assign of the reversion cannot sue for a breach of covenant committed before the assignment (*a*), unless the breach is a continuing breach (*b*). (*a*) *Lewes* v. *Ridge*, (1601) Cro. Eliz. 863; *Flight* v. *Bentley*, (1835) 7 Sim. 149; *Cohen* v. *Tannar*, [1900] 2 Q. B. 609; (*b*) Com. Dig. Covenant (B. 3), p. 269; *Mascal's Case*, (1587) Moore, 242. See also *Kingdon* v. *Nottle*, (1815) 4 M. & S. 53.

Similarly, on an assignment of the reversion a right of entry which accrued while the reversion was vested in the assignor, does not pass by the assignment. *Bergin*

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v. *Warburton*, (1862) 13 Ir. C. L. R. 137, 147; *Crane* v. *Batten*, (1854) 2 W. R. 550; *infra*, p. 120.

The assignee may sue for a breach committed in his own time, though he has assigned the reversion or his estate has determined before the action is brought. *Midgley* v. *Lovelace*, (1693) Carth. 289; 12 Mod. 45; Holt, 74; *Attoe* v. *Hemmings*, (1614) 2 Bulstr. 281.

The right of an assign of the reversion to sue the lessee is not defeated by an assignment of the lease. *Edwards* v. *Morgan*, (1685) 3 Lev. 233; *Brett* v. *Cumberland*, (1618) Cro. Jac. 522; *Thursby* v. *Plant*, 1 Wms. Saund. 240a.

Whether the breach of covenant is a continuing breach.

A covenant to do an act within a certain time is broken once for all when that time has elapsed. *Morris* v. *Kennedy*, [1896] 2 Ir. R. 247; *Grescot* v. *Green*, (1700) 1 Salk. 199; *Churchwardens of St. Saviour's* v. *Smith*, (1762) 1 Wm. Bl. 351.

But in the case of covenants to erect buildings within a certain time and keep them in repair, there may be a continuing breach of the covenant to keep in repair, though the covenant to build has been broken and the breach waived. Thus the covenant to repair may run with the reversion though the building covenant has been broken. *Jacob* v. *Down*, [1900] 2 Ch. 156; *Coward* v. *Gregory*, (1866) L. R. 2 C. P. 153; *Bennett* v. *Herring*, (1857) 3 C. B. N. S. 370.

Assignment by compulsion of law.

If a railway company buys the reversion they are bound, like other assignees, by covenants running with the reversion. But the only remedy of a tenant for breaches committed by the company in the exercise of their statutory powers is under the compensation clauses of the Railways Clauses Consolidation Act, 1845, and the Lands Clauses Consolidation Act, 1845. *Manchester*,

Sheffield and Lincolnshire Railway Co. v. *Anderson*, [1898] 2 Ch. 394.

Liability of specific devisees of the reversion.

Though a covenant runs with the reversion it does not follow that the liability is a burden upon the reversion.

As between a specific devisee of the reversion and the testator's estate it seems that the nature of the obligation must determine the ultimate liability. An obligation which is incident to the relation of landlord and tenant falls on the devisee; but if the thing to be done is preparatory to the establishment of that relation the burden of the covenant should be borne by the testator's estate. *Eccles* v. *Mills*, [1898] A. C. 371; *Mansel* v. *Norton*, (1883) 22 Ch. D. 769.

Thus, the liability to perform a covenant to finish laying down part of the land demised in grass within a year, must be borne by the general estate. *Eccles* v. *Mills*, [1898] A. C. 360.

But the specific devisee must perform a covenant to pay the tenant for his property in or upon the farm at a valuation at the end of the term. *Mansel* v. *Norton*, (1883) 22 Ch. D. 769.

The reversion.

A covenant may be made with the lessor as owner of the reversion or as owner of adjoining lands. This is a question of construction. See *Lord Dynevor* v. *Tennant*, (1888) 13 App. Cas. 279.

If the plaintiff sues as assignee of the reversion under 32 Hen. VIII. c. 34, he must show by his pleading how the reversion was created, and how he became entitled to it. *Davis* v. *James*, (1884) 26 Ch. D. 778.

The covenant runs with the reversion, which is vested in the lessor at the time when he grants the lease.

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Muller v. *Trafford*, [1901] 1 Ch. 54; *cf. M'Sweeney* v. *Drapes*, [1905] 1 Ir. R. 186, 198.

A reversion for years is within the Act 32 Hen. VIII. c. 34. *Matures* v. *Westwood*, (1598) Cro. Eliz. 599, 617.

If copyholds are enfranchised under the Copyhold Act, 1894 (57 & 58 Vict. c. 46), which are subject to any subsisting lease, the covenants in the lease run with the freehold into which the copyhold estate is converted, and the enfranchisement does not affect any right of distress, entry, or action accruing in respect of the lease. See sect. 21 (3); replacing 50 & 51 Vict. c. 73, sect. 41; 15 & 16 Vict. c. 51, sect. 44.

The Act 32 Hen. VIII. c. 34, in express terms extends to incorporeal hereditaments and tenements. See also *Martyn* v. *Williams*, (1857) 1 H. & N. 817, 829.

Moreover, if a tenant in fee simple grants an incorporeal right for a term of years he has a reversion within the meaning of the Act, and a conveyance of the fee simple during the term operates as an assignment of the reversion. *Martyn* v. *Williams*, *supra*.

This doctrine has been applied to a mineral licence (*a*); and to the exclusive right to kill, and take game upon and from lands, together with the use of a cottage on the lands (*b*); and to a wayleave, with the right to make a railway (*c*). (*a*) *Martyn* v. *Williams*, *supra*; (*b*) *Hooper* v. *Clark*, (1867) L. R. 2 Q. B. 200; (*c*) *Lord Hastings* v. *North Eastern Railway Co.*, [1898] 2 Ch. 674; affirmed, [1899] 1 Ch. 656; [1900] A. C. 260.

It seems that a tenant from year to year has a legal reversion upon a lease for years granted by him, which is capable of being assigned. *Oxley* v. *James*, (1844) 13 M. & W. 209; 13 L. J. Ex. 358.

Severance of the reversion.

See the Conveyancing Act, 1881, sect. 10 and 11, as to leases made since the commencement of the Act.

An assignee of the reversion of part of the demised property can sue in respect of that part on the lessee's covenants to repair and pay the rent. *Twynam* v. *Pickard*, (1818) 2 B. & Ald. 105; *Badeley* v. *Vigurs*, (1854) 4 El. & Bl. 71, 83; *Mayor of Swansea* v. *Thomas*, (1882) 10 Q. B. D. 48, 51.

If the lessor assigns the reversion of part of the property to A. and the reversion of the residue to B., A. and B. can each sue in respect of his interest. *Twynam* v. *Pickard, supra; per* Pollock, B., *Mayor of Swansea* v. *Thomas, supra*, 51.

If the lessor assigns the reversion of all the demised property for a less estate than he himself has, the assignee of the reversion can sue on covenants which run with the reversion, *e.g.*, if the reversion is freehold and is assigned for a term of years the assignee can sue. *Attoe* v. *Hemmings*, (1614) 2 Bulst. 281; *Wright* v. *Burroughes*, (1846) 3 C. B. 685; *Taite* v. *Gosling, per* Fry, J., (1879) 11 Ch. D. p. 277.

If a leasehold reversion is settled a legal tenant for life can sue. *Douse* v. *Earle*, (1690) 3 Lev. 264; 1 S. C. 2 Vent. 126.

The damages recoverable by the plaintiff are commensurate with his interest. A remote reversioner may recover damages in respect of injury done to the inheritance by diminishing its value. See Platt Covenants, 537.

If the reversion becomes vested in tenants in common, one of such tenants in common can enforce a covenant running with the reversion, without joining the other tenants in common. *Roberts* v. *Holland*, [1893]

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1 Q. B. 665; see also *Henniker* v. *Turner*, (1825) 4 B. & C. 157. Rawle Covenants for Title, 560 (4th ed., 1873).

Tenants in common, assignees of the reversion, may join in an action of covenant, or be jointly sued. *Womersley* v. *Dally*, (1857) 26 L. J. Ex. 219; *Kitchen* v. *Buckley*, (1663) 1 Lev. 109; *Midgley* v. *Lovelace*, (1698) Carth. 289.

It seems that if the benefit of a covenant running with the land descends upon coparceners, all must join in suing upon it; for they all constitute one heir. *Decharms* v. *Horwood*, (1834) 10 Bing. 526; 1 Platt Leases, 137.

Sect. 2 of 32 Hen. VIII. c. 34, gives the lessee and his assigns a right of action against grantees of the reversion "or any parcel thereof."

Apportionment.

A covenant to pay rent is divisible, and the rent can be apportioned. *Mayor of Swansea* v. *Thomas*, (1882) 10 Q. B. D. 48.

Whether a lessee's covenant for payment of rent is apportionable on a surrender by an assignee of the term of part of the demised premises. See *Baynton* v. *Morgan*, (1888) 22 Q. B. D. 74.

The tenant is not bound by an apportionment made without his concurrence. *Bliss* v. *Collins*, (1822) 5 B. & Ald. 876; *per* Pollock, B., *Mayor of Swansea* v. *Thomas*, *supra*, p. 51.

But it seems that a landlord contracting to sell part of the demised estate with an apportionment of a specific amount can make a good title to it without the consent of the tenant. *Walter* v. *Maunde*, (1820) 1 Jac. & W. 181.

The right of action on a lessee's covenant to repair is apportionable. *Badeley* v. *Vigurs*, (1854) 4 E. & B. 71.

Merger.

At common law the merger of the reversion destroys

the covenants which are incident to it. *Thre'r* v. *Barton*, (1570) Moore, 94; *Webb* v. *Russell*, (1789) 3 Term Rep. 393.

But it is enacted by 8 & 9 Vict. c. 106, sect. 9:

"When the reversion expectant on a lease, made either before or after the passing of this Act, of any tenements or hereditaments, of any tenure, shall, after the said 1st day of October, 1845, be surrendered or merge, the estate which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease."

Moreover, merger is now a question of intention, and a lessee taking a conveyance of the freehold cannot be supposed to have intended to merge the covenants in a sub-lease. *Craig* v. *Greer*, [1899] 1 Ir. R. 258, 272; *Ingle* v. *Vaughan Jenkins*, [1900] 2 Ch. 368; *Thellusson* v. *Liddard*, [1900] 2 Ch. 635; *Capital and Counties Bank* v. *Rhodes*, [1903] 1 Ch. 631; *Lea* v. *Thursby*, [1904] 2 Ch. 57.

A lessee's covenant to repair is not destroyed by the partial merger of the lease. The lessor and assigns of the reversion can still sue on the covenant, the damages recoverable being commensurate with the interest. *Yates* v. *Cole*, (1821) 2 Br. & B. 660; *Badeley* v. *Vigurs*, (1854) 4 El. & Bl. 71, 86.

The liability on a lessee's covenant to pay rent is not extinguished by the surrender of part of the demised premises. *Baynton* v. *Morgan*, (1888) 22 Q. B. D. 74.

Though a lease has merged at law in the reversion, a

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restrictive covenant contained in it may continue to be enforceable in equity. *Birmingham Joint Stock Co.* v. *Lea*, (1877) 36 L. T. 843; see also *Luker* v. *Dennis*, (1877) 7 Ch. D. p. 234.

As to conditions. See the Conveyancing Act, 1881, sect. 12, *infra*, p. 71.

Surrender and renewal of the lease.

When a lease is surrendered in order to be renewed, it is not necessary to obtain the concurrence of sub-lessees. By virtue of 4 Geo. II. c. 28, sect. 6, the new lease, in substance, operates as a reversion upon the underleases carrying with it the rights and liabilities which were annexed to the old reversion. See *Ecclesiastical Commissioners for England* v. *Treemer*, [1893] 1 Ch. 172; *cf. Gunn* v. *Raymond*, (1855) 5 Ir. C. L. R. p. 350.

This section also gives to the chief landlord a remedy by distress and entry in and upon the land "for rents and duties reserved" by the new lease, so far as the same exceed not the rents and duties reserved by the old lease. See *Ecclesiastical Commissioners* v. *Treemer*, *supra*, p. 174; *Doe* v. *Marchetti*, (1831) 1 B. & Ad. 715.

A lease granted by a mortgagor in possession under sect. 18 (1) of the Conveyancing Act, 1881, cannot be effectually surrendered without the concurrence of the mortgagee. *Robbins* v. *Whyte*, [1906] 1 K. B. 125.

Provisions of the Conveyancing Act, 1881.

By the Conveyancing Act, 1881, it is enacted as to leases made after the commencement of the Act:—

Sect. 10—(1). "Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go

with the reversionary estate in the land, or any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased."

Sect. 11—(1) "The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled."

It seems that sects. 10, 11, and 12 of the Conveyancing Act, 1881, do not apply unless a lease has been granted, or the case ought to be treated as if a lease had been granted and was actually in existence. *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 619; *Swain* v. *Ayres*, (1888) 21 Q. B. D. 289.

Benefit of the lessee's covenants.

If a mortgagor and mortgagee make a lease in which the covenants are with the mortgagor only they are covenants in gross (*supra*, p. 27). But it has been held in the case of *Municipal Permanent, &c., Society* v. *Smith*, (1888) 22 Q. B. D. 70, that if a lease is granted by a

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mortgagor in possession under sect. 18 of the Conveyancing Act, 1881, the mortgagee can enforce the covenants and conditions in the lease by virtue of sect. 10.

Sect. 10 would similarly apply in the case of a lease executed under any valid power.

Sect. 10 declares that covenants by a lessee may be taken advantage of by the person entitled to the "income" of the whole or any part of the land. This gives rise to the questions: (1) When a lease is granted by a mortgagor in possession under sect. 18 of the Act, will the benefit of the lessee's covenants run with the equity of redemption until the mortgagee enters? (2) If the reversion expectant on a lease is mortgaged, can the mortgagor sue on the lessee's covenants under sect. 10? and (3) If the reversion is settled can beneficiaries as well as the trustees sue on covenants having reference to the subject-matter of the lease.

(1) By sect. 2 (iii.) In relation to land, income includes rents and profits, and possession includes receipt of income.

It was held in *Municipal, &c., Society* v. *Smith, supra*, that the benefit of the lessee's covenants ran with the legal reversion; but the rights of the mortgagor and his assigns were not considered in this case.

It appears from *Municipal, &c., Society* v. *Smith supra*, and *Robbins* v. *Whyte*, [1906] 1 K. B. 125, that the relation of lessee and reversioner is created between the lessee and the mortgagee immediately upon the execution of the lease by the mortgagor.

In *Wilson* v. *Queen's Club*, [1891] 3 Ch. 522, 526, Romer, J., considered that the exercise of the power conferred on the mortgagor by sect. 18 binds the mortgaged property and the mortgagee, just as in the ordinary

real ettlement the exercise of a power of leasing by trustees will bind those entitled to the land under the limitations of the settlement.

It has been held that the benefit of a restrictive covenant will run with an equitable estate in a case not between landlord and tenant. *Rogers* v. *Hosegood*, [1900] 2 Ch. 388, 404.

See also "Estoppel," p. 76.

(2) Sect. 10 *primâ facie* applies to a mortgagor in possession as a person entitled to the "income" of the land.

Before the Judicature Acts a mortgagor in possession was entitled at law to receive the rents payable by the tenant, and to distrain at law as bailiff of the mortgagee. *Per* Romer, L.J., *Matthews* v. *Usher*, [1900] 2 Q. B. 538; *Reece* v. *Strousberg*, (1885) 54 L. T. 133; *Trent* v. *Hunt*, (1853) 9 Ex. 14.

A mortgagor entitled to the possession or receipt of the rents and profits of any land is given power to sue for recovery of such rents and profits by the Judicature Act, 1873, sect. 25 (5).

But he cannot re-enter for breach of covenants in the lease. *Matthews* v. *Usher*, [1900] 2 Q. B. 535; *Molyneux* v. *Richard*, [1906] 1 Ch. 43.

In equity he may obtain an injunction to restrain the breach of a restrictive covenant. *Fairclough* v. *Marshall*, (1878) 4 Ex. 37.

(3) Unless the words "entitled . . . to the income . . . of the land" refer only to legal owners, sect. 10 applies to beneficiaries; and if the reversion is settled an equitable tenant for life in possession would come within them. But the plaintiff in an action upon a lessee's covenant applies to the Court for the exercise

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of its legal jurisdiction, except in cases when an injunction is sought to restrain the breach of a covenant; the trustees of the settlement who are entitled to the income of the land in contemplation of law appear, therefore, to be the proper plaintiffs in the absence of any decision that a statutory right of action is given to beneficiaries by sect. 10.

Burden of the lessor's covenants.

Sect. 11 has not altered the old law as to the class of covenants the burden of which will run with the reversion. *Davis* v. *Town Properties Investment Corporation, Limited*, [1903] 1 Ch. p. 805.

It is not necessary under that section that the lessor should be the legal reversioner. The obligation of the lessor's covenants which touch or concern the thing demised will run with the legal reversion if the lessor has power to bind the reversion. But the section seems to refer only to a legal reversion and covenants enforceable at law.

The obligations of a mortgagee and his assigns, when a lease had been granted by a mortgagor in possession under sect. 18 of this Act, were considered in *Wilson* v. *Queen's Club*, [1891] 3 Ch. 526; but that case does not deal with sect. 11.

The mortgagee is not bound by a collateral agreement between the mortgagor and the tenant, that instead of paying the rent he should keep it as against an advance made by him to the mortgagor. *Municipal, &c., Society* v. *Smith*, (1888) 22 Q. B. D. 70.

Whether remaindermen are "assigns" of the tenant for life within the meaning of a covenant in a lease granted under the Settled Land Acts. See *Bath* v. *Bowles*, (1905) 93 L. T. 801.

The benefit of the

Under sect. 11 the lessor's covenants may be enforced

by the person in whom the term is from time to time vested.

lessor's covenants.

Neither 32 Hen. VIII. c. 34, nor the Conveyancing Act, 1881, ss. 10, 11 and 12, apply to covenants in a deed varying the terms of a lease, there being no re-demise of the land.

Covenants not contained in the lease.

It may be useful to state here that sect. 12 of the Conveyancing Act, 1881, provides for the apportionment of conditions in leases made since the commencement of the Act, notwithstanding severance of the reversion and cesser of the term as to part only of the land. Under sects. 10 and 12 of the Conveyancing Act conditions run with the reversion, notwithstanding severance.

Conditions.

It has been questioned whether sect. 12 applies in the case of a re-demise to the lessor of part of the demised property, or that of the lessor concurring in an apportionment on an assignment by the lessee of part of the property. Key & Elphinstone Prec., Vol. I., 56, n. (8th ed.), citing *Mortimer* v. *Shortall*, (1842) 1 Con. & Law. 417, 426; *Lessee Delap* v. *Leonard*, (1842) 5 Ir. L. Rep. 287; (1844) 6 Ir. L. Rep. 473.

Lord St. Leonards' Act (22 & 23 Vict. c. 35), sect. 3, also provides for apportionment of conditions. But this Act only applies to assignees of the reversion and to conditions of re-entry for non-payment of rent, when there has been a legal apportionment.

It has been held under 32 Hen. VIII. c. 34, that if the reversion is granted of part only of the land demised conditions in the lease are destroyed, and neither the lessor (*a*) nor the grantee (*b*) can take advantage of them. For at common law a condition, if entire, cannot be apportioned by act of the parties, but is destroyed by severance of the reversion (*c*). (*a*) *Twynam* v. *Pickard*,

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(1818) 2 B. & Ald. 105, 112; (*b*) *Wright* v. *Burroughes*, (1846) 3 C. B. 685, 700; *Winter's Case*, (1572) 3 Dyer, 308b; Co. Litt. 215a; (*c*) *Dumpor's Case*, (1603) 4 Rep. 119b; *Knight's Case*, (1588) 5 Rep. 54b.

If the lessor grants the reversion of all the demised land for a less estate than he himself has the conditions are not destroyed. *Wright* v. *Burroughes*, *supra*.

5. Tenants in Common and Joint Tenants.

Leases by tenants in common.

If a tenant in common demises his undivided share covenants in the lease, which touch or concern the thing demised, will run with his share as a separate reversion. See *Sampson* v. *Easterby*, (1829) 4 Man. & Ry. 422; 9 B. & C. 505; (1830) 6 Bing. 644.

Tenants in common having distinct estates in the land cannot make a joint lease of the whole estate. Such a lease is taken to be the lease of each of his share and the cross confirmation of each for the share of the other, with no estoppel on either part. *Beer* v. *Beer*, (1852) 12 C. B. 60, 81; *Thompson* v. *Hakewill*, (1865) 19 C. B. N. S. 713, 726; *Heatherley* d. *Worthington* v. *Weston*, (1764) 2 Wils. 232.

If several tenants in common make a lease the covenants may run with their undivided shares as separate reversions (*a*) or with the entire reversion (*b*). (*a*) *Cf.* *Beer* v. *Beer*, (1852) 12 C. B. 60, 81; (*b*) *Thompson* v. *Hakewill*, *supra*, p. 727; see also notes to *Eccleston* v. *Clipsham*, 1 Wms. Saund. 162 (1871 ed.); *cf.* *Powis* v. *Smith*, (1822) 5 B. & Ald. 850; Litt. sects. 314, 315, 316.

In the case of *Thompson* v. *Hakewill*, *supra*, the Court held that "where two tenants in common were entitled to

the benefit of a covenant contained in a joint demise originally made by tenants in common, they must both join as plaintiffs in an action of covenant." This was a covenant to repair. See *per* Wills, J., *Roberts* v. *Holland*, [1893] 1 Q. B. 665, 668.

Leases by joint tenants.

Joint tenants may join in making a lease of the whole, or may severally lease their undivided shares to a stranger or to one another. Co. Litt. 186a; *Henstead's Case*, (1594) 5 Rep. 10b; *Doe* d. *Aslin* v. *Summersett*, (1830) 1 B. & Ad. 135, 140; *Cowper* v. *Fletcher*, (1865) 6 B. & S. 464.

If one purports to demise the whole his share only will pass. *Bellingham* v. *Alsop*, (1604) Cro. Jac. 53; *Morris* v. *Barry*, (1742) 1 Wils. 2; *Philpott* v. *Dobbinson*, (1829) 8 M. & P. 320.

If a joint tenant for years makes a lease of his share (*a*) or of the whole land (*b*), the reversion is absolutely severed. (*a*) *Sym's Case*, (1584) Cro. Eliz. 33; Co. Litt. 192a; 1 Inst. 192a; (*b*) *Connolly* v. *Connolly*, (1866) 17 Ir. Ch. R. 208, 222.

It seems that when the joint tenants are seised in fee and one of them makes a lease for years, the reversion is not severed. But the other joint tenant, if he is the survivor, cannot sue on a covenant to pay the rent to the lessor and his heirs; for he claims by title paramount the lease. If the joint tenancy is severed before the lease is granted, the rent will go to the heir or devisee of the reversion. If the lease is for life the jointure is severed during the term, but the joint tenants will resume their joint-tenancy on the determination of the lease in their lifetime. See 1 Platt Leases, 129, 130.

As to the effect of a lease by the husband of one joint

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tenant and the other joint tenant. See *Palmer* v. *Rich*, [1897] 1 Ch. 184.

Leases to tenants in common.

If the demise is to tenants in common and they covenant jointly and not severally, the burden of the covenant devolves upon the survivor. *White* v. *Tyndall*, (1888) 13 App. Cas. 263.

Leases to joint tenants.

If the lessees are joint tenants and they covenant jointly and severally, the lessor may at his election sue the surviving lessee or the personal representative of a deceased lessee, though the personal representative has no interest as tenant. *Burns* v. *Bryan*, (1887) 12 App. Cas. 184; *Enys* v. *Donnithorne*, (1761) 2 Burr. 1190; *cf. National Society, &c.* v. *Gibbs*, [1900] 2 Ch. 280.

If the joint tenants covenant jointly and severally and the covenant runs with the land, the assignee of one of them is liable on the covenant. *Norval* v. *Pascoe*, (1864) 34 L. J. Ch. 82.

Construction of covenants by and with tenants in common and joint tenants.

When the covenant is ambiguous, the interest in the land appearing on the face of the deed of the parties to the covenant may be considered in construing the covenant.

(i.) *Liability of Covenantors.*

"If two covenant generally for themselves, without any words of severance, or that they or one of them shall do such a thing, a joint charge is created; which shows the necessity of adding words of severalty where the covenantor's liability is to be confined to his own acts." Platt Covenants, 117; approved, *White* v. *Tyndall*, (1888) 13 App. Cas. 269.

If the terms of the covenant import without ambiguity a joint and not a several obligation, the covenant

is a joint one. Where the terms are ambiguous the interests of the covenantors may be looked at, and any other circumstance appearing on the face of the instrument which will aid in the determination of the intention of the parties. See *per* Lord Herschell, *White* v. *Tyndall*, (1888) 13 App. Cas. p. 276.

(ii.) *Rights of Covenantees.*

If the covenant is ambiguous it will be joint if the interest be joint, and it will be several if the interest be several. But if it be in its terms unmistakeably joint, then, although the interest be several, all the parties must join in the action. So if the covenant be made clearly several, the action must be several, though the interest be joint. See *per* Pollock, C.B., *Keightley* v. *Watson*, (1849) 3 Ex. 716, 721; *per* Parke, B., *ib.* 723; *per* Maule, J., *Beer* v. *Beer* (1852) 12 C. B. 60, 78; *per* Lord Campbell, *Haddon* v. *Ayres*, (1858) 1 El. & El. 118, 149; *Palmer* v. *Mallet*, (1887) 36 Ch. D. 411; notes to *Eccleston* v. *Clipsham*, 1 Wms. Saund. 162 (1871 ed.).

These decisions have modified the doctrine (*cf.* Platt Covenants, 123) that covenants shall be measured and moulded according to the interests of the covenantees. That doctrine is limited to covenantees. There is no authority for extending it to the case covenantors. See *per* Lord Herschell, *White* v. *Tyndall*, (1888) 13 App. Cas. 277.

If the words of the covenant are not unmistakeably joint and "the covenant is to several for the performance of several duties to each of them," the covenant will be moulded according to the interests of the covenantees. *White* v. *Tyndall*, (1888) 13 App. Cas. p. 277; *per* Wills, J.,

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Roberts v. *Holland*, [1893] 1 Q. B. 668, citing Platt Covenants, p. 130; *Harrold* v. *Whitaker*, (1846) 11 Q. B. 147, 161; *Mills* v. *Ladbroke*, (1844) 7 Man. & G. 218; *Palmer* v. *Sparshott*, (1842) 4 Scott N. R. 743; *Poole* v. *Hill*, (1840) 6 M. & W. 835; *Servante* v. *James*, (1829) 10 B. & C. 410; *Withers* v. *Bircham*, (1824) 3 B. & C. 254; *James* v. *Emery*, (1818) 8 Taunt. 245.

(iii.) *Covenants in Law.*

"Covenants implied by construction of law, as on the word *demiserunt*, will be co-extensive with the interest granted." See Platt Covenants, 118; citing *Coleman* v. *Sherwin*, (1689) 1 Show. 79; *S. C.* Carth. 97; 1 Salk. 137; Comb. 163; see also *Smith* v. *Pocklington*, (1831) 1 Cr. & Jer. 445.

6. Estoppel.

The tenant and his assigns.

A tenant in possession is estopped from denying his landlord's title to grant the lease. *Palmer* v. *Ekins*, (1728) 2 Lord Raym. 1550; *Homan* v. *Moore*, (1817) 4 Price, 5; *Morton* v. *Woods*, (1869) L. R. 4 Q. B. 293.

"The principle is, that a tenant shall not contest his landlord's title; on the contrary, it is his duty to defend it. If he objects to such title let him go out of possession." *Per* Tindal, C.J., *Doe* d. *Manton* v. *Austin*, (1823) 9 Bing. 45; 2 M. & Sc. 107; *Agar* v. *Young*, (1841) Car. & M. 78.

Thus, to an action by a lessor for breach of a lessee's covenant to repair, &c., the lessee could not plead in bar that the lessor had only an equitable estate in the land. *Blake* v. *Foster*, (1800) 8 Term Rep. 487; *Cuthbertson* v. *Irving*, (1859) 4 H. & N. 742; (1860) 6 H. & N. 135; *cf.*

Doe d. *Nepean* v. *Budden*, (1822) 5 B. & Ald. 626; *Francis* v. *Doe* d. *Harvey*, (1838) 4 M. & W. 331.

But a tenant may show that since the demise his landlord's title has ceased. *Langford* v. *Selmes*, (1857) 3 K. & J. 220; *Serjeant* v. *Nash, Field & Co.*, [1903] 2 K. B. 304, 314; Cole Ejectment, 217.

A tenant may not impeach his landlord's title against the landlord's heir (*a*) or assign (*b*). (*a*) *Weeks* v. *Brich*, (1893) 69 L. T. 759; (*b*) *Parker* v. *Manning*, (1798) 7 Term Rep. 537; *Rennie* v. *Robinson*, (1823) 1 Bing. 147; *Ward* v. *Ryan*, (1875) 10 Ir. R. C. L. 17.

Thus, if a mortgagor in possession, having at the time of granting a lease no legal title but only an equity of redemption, assigns all his estate and title to a third person who sues the tenant on the covenant to repair, the tenant is estopped from denying that the lessor had such a legal estate as would warrant the lease. *Cuthbertson* v. *Irving*, (1859) 4 H. & N. 742; (1860) 6 H. & N. 135.

But the tenant may traverse the title of the assign to the reversion. *Carvick* v. *Blagrave*, (1819) 1 Br. & B. 531; followed, *Seymour* v. *Franco*, (1828) 7 L. J. O. S. K. B. 18; *Weld* v. *Baxter*, (1856) 11 Ex. 816; affirmed, 1 H. & N. 568.

Thus, he may deny that the lessor had such a title as could pass the right of action to the assignee. *Ib.*

The estoppel extends to an assign of the term (*a*), and to all persons who claim possession through or under the tenant (*b*). (*a*) *Taylor* v. *Needham*, (1810) 2 Taunt. 278; (*b*) *London and North Western Railway Co.* v. *West*, (1867) L. R. 2 C. P. 553; *Cooper* v. *Blandy*, (1834) 1 Bing. N. C. 45; *Doe* d. *Bullen* v. *Mills*, (1834) 4 N. & M. 25; *Doe* d. *Manton* v. *Austin*, (1832) 9 Bing. 41.

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Persons not claiming possession of the land under the tenant are not estopped. *Tadman* v. *Henman*, [1893] 2 Q. B. 168.

Moreover, a tenant may be estopped by recognising the title of a person claiming to be his landlord as by payment of rent to him or by submitting to a distress. *Jump* v. *Payne*, (1899) 68 L. J. Q. B. 607; *Carlton* v. *Bowcock*, (1884) 51 L. T. 659; *Cooper* v. *Blandy*, (1834) 1 Bing. N. C. 45; *Panton* v. *Jones*, (1813) 3 Camp. 372; but see *per* Stirling, L.J., *Serjeant* v. *Nash, Field & Co.*, [1903] 2 K. B. 315.

But this is only *primâ facie* evidence of the landlord's title which may be rebutted by other evidence. *Cox* v. *Knight*, (1856) 25 L. J. C. P. 314; *Doe* d. *Harvey* v. *Francis*, (1837) 2 M. & Rob. 57; *Jones* v. *Stone*, [1894] A. C. 122; *per* Stirling, L.J., *Serjeant* v. *Nash, Field & Co.*, *supra*.

A person who takes possession of leasehold property and deals with it as his own may be estopped from denying that he is an assignee of the term. See *Williams* v. *Heales*, (1874) L. R. 9 C. P. 177.

The landlord and his assigns.

The estoppel is mutual. The landlord is not permitted to set up his want of title against the tenant, and is liable to the tenant on his covenants in the lease. *Hartcup & Co.* v. *Bell*, (1883) 1 Cab. & E. 19.

Assigns of the reversion are also estopped. *Sturgeon* v. *Wingfield*, (1846) 15 L. J. N. S. Ex. 212.

Moreover, a person who has assumed the character of reversioner on an underlease may be estopped by his conduct from denying that he is the reversioner, and this estoppel extends to persons deriving title under him. *Keith* v. *Gancia & Co., Limited*, [1904] 1 Ch. 774.

Want of title

It has been held in cases where the tenancy was

shown by the deed.

created by attornment, that the estoppel arose and a distress for rent was valid, though it appeared on the face of the deed containing the attornment that the landlord had no title at law. *Jolly* v. *Arbuthnot*, (1859) 4 De G. & J. 224; 28 L. J. Ch. 547; *Morton* v. *Woods*, (1869) L. R. 4 Q. B. 293; *Ex parte Punnett*, (1880) 16 Ch. D. 226.

In an action of covenant in which the covenant must be enforceable as an obligation at law, it was held that neither party was estopped from denying that the lessors had a legal reversion when it appeared on the face of the lease that they were only entitled in equity. *Pargeter* v. *Harris*, (1845) 7 Q. B. 708; *per* Martin, B., *Cuthbertson* v. *Irving*, (1859) 4 H. & N. 754; affirmed, (1860) 6 H. & N. 135; see also *Saunders* v. *Merryweather*, (1865) 3 H. & C. 902; Co. Litt. 352b.

These cases were not considered to be directly in point in *Morton* v. *Woods*, *supra*. But it is stated in that case that if any of the decisions there cited were to lead to the conclusion that where the truth appears there can be no estoppel, that doctrine must be taken to be overruled by the case of *Jolly* v. *Arbuthnot*, *supra*. See *Morton* v. *Woods*, *supra*, p. 303.

The estoppel may continue in favour of an assignee of the reversion, though the want of a legal title appears on the face of the assignment. *Cuthbertson* v. *Irving*, (1859) 4 H. & N. 742; (1860) 6 H. & N. 135.

When the lease takes effect in interest.

The mere fact that a lessor professes to deal with the whole of an estate when he has power only to deal with part does not bring the lessee within the rule that there is no estoppel when an interest passes. *Weeks* v. *Birch*, [1893] 69 L. T. p. 761; *Doe* v. *Seaton*, (1835) 2 C. M. & R. 728; Cole Ejectment, 217.

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Thus, where one of three coparceners in gavelkind being in possession granted a lease of the whole land and the tenant paid rent as for the whole of the land demised, the lessee was held not to be within the rule. *Weeks* v. *Birch*, [1893] 69 L. T. 759.

If the lessor has no title at the time of granting the lease, but during the lease acquires an estate in the land, the estoppel is said to be fed and the lease then takes effect in interest and not by estoppel (*a*). The covenants in the lease then attach to the lessor's estate (*b*). (*a*) *Webb* v. *Austin*, (1844) 7 Man. & G. 701; *Cuthbertson* v. *Irving*, (1859) 4 H. & N. p. 754; affirmed, (1860) 6 H. & N. 135; (*b*) *Church* v. *Dalton*, (1852) 2 Ir. C. L. R. 249.

Covenants will run with an estate by estoppel.

A reversion by estoppel is *primâ facie* a reversion in fee simple by estoppel, which passes by descent to the lessor's heir and by purchase to his assignee or devisee. *Sturgeon* v. *Wingfield*, (1846) 15 M. & W. 224; 15 L. J. Ex. 212; *Cuthbertson* v. *Irving*, *supra*.

But the lessee may plead that the reversion is not freehold against persons claiming as assigns of the reversion. *Weld* v. *Baxter*, (1856) 11 Ex. 816; affirmed, 1 H. & N. 568.

If the reversion by estoppel is assigned, covenants running with the reversion pass with it to assigns who may sue and be sued upon them. *Sturgeon* v. *Wingfield*, *supra*; *Cuthbertson* v. *Irving*, *supra*; and see *Norris* v. *Craig*, (1895) 64 L. J. Q. B. 432.

7. The Rule against Perpetuities.

The rule against perpetuities does not apply to a covenant for perpetual renewal contained in a lease (*a*). It seems that such a covenant creates an interest which

vests in the lessee at the date of the execution of the lease (*b*). (*a*) *Per* Farwell, J. *Muller* v. *Trafford*, [1901] 1 Ch. 54, 60; *London and South Western Railway Co.* v. *Gomm*, (1882) 20 Ch. D. p. 579; *Pollock* v. *Booth*, (1875) Ir. R. 9 Eq. 229; *Bridges* v. *Hitchcock*, (1715) 5 Bro. P. C. 6; (*b*) see *Muller* v. *Trafford*, *supra*, p. 61; *Woodall* v. *Clifton*, [1905] 2 Ch. p. 265; *Moore* v. *Clench*, (1875) 1 Ch. D. 447, 452; *Winslow* v. *Tighe*, (1812) 2 Ball & Beat. 195, 205.

But the right to apply for renewal must be given to persons in privity with the lease. *Hope* v. *Corporation of Gloucester*, (1855) 7 De G. M. & G. 647; *Pollock* v. *Booth*, *supra*, 248; *Redington* v. *Browne*, (1893) 32 L. R. Ir. 347, 358.

An option to purchase the freehold given to a lessee, his heirs or assigns, at any time during a term of ninety-nine years, infringes the rule and is void. *Woodall* v. *Clifton*, [1905] 2 Ch. 257.

But damages may be recoverable for a breach of the covenant though it infringes the rule and will not be specifically enforced. *Worthing Corporation* v. *Heather*, [1906] 2 Ch. 532.

8. Option to Purchase the Freehold.

A contract in a lease giving an option to purchase may be enforceable against heirs or assigns apart from the statute of Henry VIII., if it does not infringe the law as to perpetuities. For it is not the less a binding contract because it is contained in a lease. *Woodall* v. *Clifton*, [1905] 2 Ch. p. 278; see, further, *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1901] 2 Ch. 37; Fry Specific Performance, p. 98 (4th ed., 1903).

A covenant in a lease giving the lessee an option to

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purchase the freehold is not within 32 Hen. VIII. c. 34. *Woodall* v. *Clifton*, [1905] 2 Ch. 257.

An equitable assignee of the lease is not entitled to the benefit of an option to purchase given to the lessee, his executors, administrators, and assigns. *Friary Holroyd & Healey's Breweries, Limited* v. *Singleton*, [1899] 1 Ch. 86; 2 Ch. 261.

9. Restrictive Covenants.

The rule in *Tulk* v. *Moxhay*, (1848) 2 Phil. 774.

A covenant made between landlord and tenant may be enforceable in equity though in contemplation of a Court of law it is not a covenant running with the land. For a Court of equity will restrain by injunction a person who has acquired land with notice of a covenant that it shall not be used in a particular way from breaking that covenant.

This rule has been applied in many cases to covenants made between landlord and tenant.

(i.) *Lessee's Covenants Restricting the Use of the Land Demised.*

The burden of the covenant.

A tenant in possession under an agreement for a lease which is to contain a restrictive covenant is bound in equity by the covenant. *Evans* v. *Davis*, (1878) 10 Ch. D. 747; *cf. Kehoe* v. *Marquis of Lansdowne*, [1893] A. C. 451.

If a lessee covenants with a lessor restricting the use of the demised land, the covenant is enforceable in equity against an undertenant and his assigns (*a*); or a mere occupier who has taken possession with notice of the covenant (*b*). (*a*) *Parker* v. *Whyte*, (1863) 1 H. & M. 167; *Clements* v. *Welles*, (1865) L. R. 1 Eq. 200; *Feilden*

v. *Slater*, (1869) L. R. 7 Eq. 523, 530; *Patman* v. *Harland*, (1881) 17 Ch. D. 353; *Tritton* v. *Bankart*, (1887) 56 L. T. 306; *Hall* v. *Ewin*, (1887) 37 Ch. D. 74, 79; *Teape* v. *Douse*, (1905) 92 L. T. 319; (*b*) *Mander* v. *Falcke*, [1891] 2 Ch. 554.

But an undertenant is not liable for not taking active proceedings to enforce the covenant. *Hall* v. *Ewin*, (1887) 37 Ch. D. 74.

Land not included in the demise.

Similarly, a lessee's covenant as to the user of land not included in the demise is enforceable in equity against assignees of that land who take with notice of the covenant. *Luker* v. *Dennis*, (1877) 7 Ch. D. 227.

Increased rent.

An additional rent, payable upon a breach of a restrictive covenant, is sometimes reserved. This may be done so as to give the lessor an alternative remedy to the right of re-entry. See *Weston* v. *Managers of the Metropolitan Asylum District*, (1882) 9 Q. B. D. 404.

Sum named as liquidated damages.

It has been held that a covenant to pay liquidated damages for user contrary to a restrictive covenant was enforceable against an assignee of a lease. The provision as to the payment of damages was apparently treated as part of the restrictive covenant and as such binding upon the assignee. *Lord Howard de Walden* v. *Barber*, (1903) 19 Times Rep. 183.

The benefit of the covenant.

If the owner of an estate grants a lease of a plot of land to A., who enters into a restrictive covenant with him, and subsequently grants a lease of an adjoining plot to B., who enters into a similar covenant with him, the covenant in A.'s lease does not enure for the benefit of B. *Master* v. *Hansard*, (1876) 4 Ch. D. 718.

Nor can A. enforce the covenant entered into by B. The landlord is not bound to sue B. at the request of A.,

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who is neither covenantee nor assignee of B.'s covenant. *Ashby* v. *Wilson*, [1900] 1 Ch. 66; *Kemp* v. *Bird*, (1877) 5 Ch. D. 974.

In the case of *Fitz* v. *Iles* this point was not in controversy. See *Fitz* v. *Iles*, [1893] 1 Ch. p. 81; *Ashby* v. *Wilson*, *supra*, p. 71.

Different considerations apply if there is a general scheme by which restrictions are imposed on the user of the property for the benefit of the lessees of an estate. In that case the covenants are mutually enforceable by the lessees. See *Spicer* v. *Martin*, (1888) 14 App. Cas. 12, *infra*, p. 88.

It appears that if a lease contains restrictive covenants the lessee and his assigns can enforce the restrictions against persons deriving title under a sub-lessee of part of the demised property, though the sub-lease contains no restrictions. For the breach of the restrictive covenants in the head lease is not legally justifiable, and is attended with peril to the interests of all persons holding under the head lease. *Maunsell* v. *Hort*, (1877) 1 L. R. Ir. 88; see also *Craig* v. *Greer*, [1899] 1 Ir. R. 258, 270, where the sub-lease was expressed to be subject to the covenants in the head lease.

Covenants to buy beer.

In a brewer's lease of a public-house the lessee usually covenants to buy beer of the lessor only.

Questions have arisen upon the construction of these covenants in cases where the reversion and the goodwill of the lessor's business have become vested in different persons.

It has been held that the executors of the lessor, after selling the lessor's business, can enforce a lessee's covenant not to deal in wines, &c., other than shall have been supplied by or through the lessor, his successors or

assigns. *White* v. *Southend Hotel Co.*, [1897] 1 Ch. 767.

But this covenant would not be enforceable by a purchaser of the business who was not an assign of the reversion. *Ib.* 771, 774.

If the meaning of the covenant is that the lessee is to buy beer of the lessor and his successors in business, an assign of the reversion, who has not acquired the lessor's business, cannot enforce the covenant. *The Birmingham Breweries, Limited* v. *Jameson*, (1898) 76 L. T. 512.

The covenant in that case is enforceable by assigns of the reversion who are the lessor's successors in business. See *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 608.

If the covenant means that the tenant is to buy beer made at a particular brewery, assigns of the business and reversion cannot enforce the covenant after shutting up the brewery, though they are carrying on the lessor's business at another place. *Doe* v. *Reid*, (1830) 10 B. & C. 849; considered, *Clegg* v. *Hands*, (1890) 44 Ch. D. 517; *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. p. 613.

But it has been held upon the construction of a covenant to buy beer, &c., of brewers, "provided they or he shall at such time deal in or vend such liquors," that the benefit of it was not restricted either to assigns carrying on the same business as the lessors, or to assigns who made beer. *Clegg* v. *Hands*, (1890) 44 Ch. D. 503; explained, *per* Lindley, M.R.; *The Birmingham Breweries, Limited* v. *Jameson*, (1898) 78 L. T. p. 515.

Moreover, the covenant may be personal to the lessor. In that case it is not enforceable by assigns. *Roberts* v *Heaton*, (1898) 42 Sol. J. 715.

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This question arose upon the construction of the covenant in *Clegg* v. *Hands*, *supra*. The lease there contained a definition clause by which the word "lessors" included assigns, and it was held that the covenant did not show an intention to exclude the definition clause, and was assignable.

Conveyancing Act, 1892, sect. 4.

If the lease of a public-house is forfeited and an underlessee applies for relief under sect. 4 of the Conveyancing Act, 1892, the Court may make an order under that section vesting the property in the underlessee for a term of years, at a higher rent than that reserved by the underlease, having regard to the fact that the public-house had been tied by the sub-lease to the lessee's brewery and is now freed from the tie. *Ewart* v. *Fryer*, [1901] 1 Ch. 499; [1902] A. C. p. 194.

Relief can be given under this section to underlessees against forfeiture for breach of any covenant in the head lease. *Gray* v. *Bonsall*, [1904] 1 K. B. 601.

The Conveyancing Act, 1881, sect. 14 (2).

Under sect. 14 (2) of the Conveyancing Act, 1881, "the Court can only grant relief from the consequences of past forfeiture, and cannot do anything to condone a continuing breach in the future." *Batson* v. *The School Board for London*, [1904] 69 J. P. 9.

(ii.) *Lessor's Covenants Restricting the Use of Neighbouring Land.*

The burden of the covenant.

In many cases the lessor covenants with the lessee not to use land, which he holds in the neighbourhood of the demised property, for some particular purpose. Such covenants are enforceable against all persons taking the land with notice of the covenant, if this is the intention of the parties upon the construction of the

covenant. See *Holloway Brothers* v. *Hill*, [1902] 2 Ch. 612, 616; *Kemp* v. *Bird*, (1877) 5 Ch. D. 549, 974.

Lessees of the covenantor may be restrained from infringing the covenant, whether assigns are named in the covenant or not. *Holloway Brothers* v. *Hill*, *supra*.

It has been held upon the construction of a lessor's covenant of this nature that the covenant was enforceable against lessees of neighbouring land, though the covenant was not expressed to bind lessees and assigns were referred to in the covenant. For this alone was not sufficient to exclude lessees. *Ib.*

Covenants "not to let" for a particular purpose.

If the landlord covenants with the tenant not to let adjoining property for the purpose of carrying on a particular trade, neither the landlord nor a purchaser from him is precluded from using the property for that trade. *Per* Romer, L.J., *Brigg* v. *Thornton*, [1904] 1 Ch. 386, 395; but see *Jay* v. *Richardson*, (1862) 30 Beav. 563.

The landlord's covenant not to let the property for carrying on a trade does not prevent a tenant of the property from using it for that trade. *Brigg* v. *Thornton*, *supra*; *Ashby* v. *Wilson*, [1900] 1 Ch. 66; *Kemp* v. *Bird*, (1877) 5 Ch. 549, 974.

If the covenant is in this form and the landlord lets the property in breach of the covenant to a tenant, who carries on the trade, the landlord is liable in damages to the covenantee; but the covenantee has no remedy against the tenant either by injunction or damages. *Brigg* v. *Thornton*, *supra*.

As to the form of order in *Brigg* v. *Thornton*. See [1904] 1 Ch. 397.

The covenantee, also, has no remedy against the tenant, though the tenant has covenanted with the

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landlord to use the premises only for the purpose of some other trade. *Ashby* v. *Wilson*, [1900] 1 Ch. 66.

Whether a covenant by landlords "not to give their consent" to a trade being carried on upon property imposes any obligation upon subsequent tenants of the property. See *Stuart* v. *Diplock*, (1889) 43 Ch. D. 343.

A covenant not to sell land without imposing a restriction against the user of the land for the purpose of a beershop, has been held to preclude the user of the land for that purpose by persons deriving title under the covenantors. In this case the covenant referred to part of a building estate, and it was the intention of the parties that there should be one public-house only on the estate. *Nicoll* v. *Fenning*, (1881) 19 Ch. D. 258.

The benefit of the covenant.

It appears that the benefit of a lessor's covenant not to let neighbouring property or permit it to be used for a particular purpose enures in equity to an assign of the lease. See *per* Channel, J., *Bailey* v. *Skinner*, (1898) 42 Sol. J. 780; *Ashby* v. *Wilson*, [1900] 1 Ch. p. 70; *Kemp* v. *Bird*, (1877) 5 Ch. D. 549, 974.

(iii.) *Leases of a Building Estate.*

Restrictions imposed for the benefit of tenants of an estate.

If a lessor puts his estate on the market as bound by restrictive covenants, which are meant by the lessor and understood by the lessees to be for the common advantage of lessees of the estate, the lessees and their assigns can enforce the restrictions against each other and against the lessor, though he has not expressly covenanted to observe them. *Spicer* v. *Martin*, (1888) 14 App. Cas. 12.

If the restrictive covenant is contained in a head lease and the property has not been held out to sub-lessees

as bound by the covenant and the sub-leases show no uniformity of purpose, a sub-lessee cannot compel assigns of the lessee who have taken a conveyance of the freehold to observe it. *Graham* v. *Craig*, [1902] 1 Ir. R. 264.

Collateral contract by the lessor.

"If a man makes a representation that property is subject to covenants affecting it permanently, and he does so in order to induce a person to buy part of such property, and the person buys on the faith of such representation, the representation amounts to a contract by the vendor that he will not do anything to prevent the property from continuing what he has represented it to be." *Per* Lindley, L.J., *Martin* v. *Spicer*, (1886) 34 Ch. D. 12; *Piggott* v. *Stratton*, (1859) 1 De G. F. & J. 33.

Piggott v. *Stratton* was a case of bad faith. *Per* Lord Macnaghten, *Spicer* v. *Martin*, (1888) 14 App. Cas. 23.

(iv.) *Tenancies of Flats.*

Obligation of landlord to observe rules imposed by him.

The principles laid down in *Spicer* v. *Martin*, (1888) 14 App. Cas. 12, have been applied to tenancies of flats. If the landlord makes use of a form of agreement binding tenants of flats in a building to rules which constitute a scheme for the general management of the building, the tenants can restrain the landlord from departing from the scheme. Thus, where the agreements bound the tenants to rules suitable for tenancies of residential flats a landlord has been restrained from using part of the building for a club (*a*), hotel (*b*), or public offices (*c*). (*a*) *Hudson* v. *Cripps*, [1896] 1 Ch. 265; (*b*) *Alexander* v. *Mansions Proprietary, Limited*, (1900) 16 Times Rep. 431; (*c*) *Gedge* v. *Bartlett*, 17 Times Rep. 48.

Improper user by a tenant.

A tenant may obtain an injunction against the landlord in respect of improper user by another tenant, if the

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landlord can be shown to be a party to such user. *Jaege* v. *Mansions Consolidated, Limited*, (1903) 87 L. T. 690 19 Times Rep. 114, 145.

(v.) *Waiver.*

Mere standing by does not operate as a waiver though the lessee spends money on the property (*a*) Some positive act of waiver, as receipt of rent, is necessary (*b*). (*a*) *Perry* v. *Davis*, (1858) 3 C. B. N. S. 769 (*b*) *Doe* d. *Sheppard* v. *Allen*, (1810) 3 Taunt. 78; *per* Williams, J., *Ward* v. *Day*, (1864) 33 L. J. Q. B. 254

In the case of a covenant that rooms shall not be used for certain purposes, there is a new breach of covenant every day during the time that they are so used. *Doe* d *Ambler* v. *Woodbridge*, (1829) 9 B. & C. 376.

But the conversion of a house into a shop (*a*), or the alteration of a house (*b*), is a breach complete at once, and the forfeiture thereby incurred is waived by a subsequent acceptance of rent (*a*). (*a*) *Per* Curiam, *Doe* d. *Ambler* v. *Woodbridge, supra*; *Bridges* v. *Longman*, (1857) 24 Beav. 27; (*b*) *Miles* v. *Tobin*, (1868) 17 L. T. 432.

In the case of a lessee's covenant "not to permit" the premises to be used for a certain trade, if the landlord accepts rent with a knowledge that the premises are being used by a sub-tenant for that purpose, he waives the breach during the continuance of the sub-tenancy. *Griffin* v. *Tomkins*, (1880) 42 L. T. 359; applying *Walrond* v. *Hawkins*, (1875) L. R. 10 C. P. 342; but see *per* Bramwell, L.J., *Lawrie* v. *Lees*, (1880) 14 Ch. D. 249; (1881) 7 App. Cas. 19.

It is competent for the lessee to show that he has let the sub-tenant in under a lease for several years. But in the absence of such evidence, the Court refused to

presume that a business carried on by the sub-tenant could be commenced upon a less tenancy than a year. *Griffin* v. *Tomkins*, *supra*.

Whether the receipt of rent by a lessor with knowledge of a breach of covenant of this description amounts to a licence to continue the breach, *quære*. See *per* Cockburn, C.J., *ib.* p. 362.

(vi.) *Parties to an Action.*

The circumstances of each case determine whether a lessor is properly joined as a defendant to proceedings for an injunction to enforce a restrictive covenant against a person claiming under the lessor. *Holloway Brothers* v. *Hill*, [1902] 2 Ch. p. 619.

It has been held that a freehold reversioner who did not defend the action was not properly joined in proceedings against his tenant, though he had covenanted not to permit the land to be used in the manner complained of. *Feilden* v. *Slater*, (1869) L. R. 7 Eq. 523.

A covenantor who has parted with all his interest in the property and is not in any way in fault is not properly joined as a defendant. *Clements* v. *Welles*, (1865) L. R. 1 Eq. 200.

An assignee of an underlease is not a proper party to proceedings against his undertenant by the head landlord, there being no evidence that he consented to the acts complained of. *Hall* v. *Ewin*, (1887) 37 Ch. D. 74.

But a lessee was held to be a proper defendant with sub-lessees in *Craig* v. *Greer*, [1899] 1 Ir. R. 258; see also *per* Swinfen Eady, J., *Teape* v. *Douse*, (1905) 92 L. T. 319.

An assignee of a lease who had licensed the breach

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of covenant was held to be a proper defendant in *Tritton* v. *Bankart*, (1887) 56 L. T. 306; 35 W. R. 474; distinguish *Wilson* v. *Twamley*, [1904] 2 K. B. 105.

A tenant in possession is a proper defendant to proceedings by the landlord in respect of acts done upon the property. *Evans* v. *Davis*, (1878) 10 Ch. D. 747.

10. Derogation.

"Where a landlord demises part of his property for carrying on a particular business, he is bound to abstain from doing anything on the remaining portion which would render the demised premises unfit for carrying on such business in the way in which it is ordinarily carried on, but this obligation does not extend to special branches of the business which call for extraordinary protection." *Aldin* v. *Latimer, Clark, Muirhead & Co.*, [1894] 2 Ch. p. 444; *Robinson* v. *Kilvert*, (1889) 41 Ch. D. 88; *cf. Grosvenor Hotel Co.* v. *Hamilton*, [1894] 2 Q. B. 836; *Wilson* v. *Queen's Club*, [1891] 3 Ch. p. 526; *Leader* v. *Moody*, (1875) L. R. 20 Eq. 145; distinguish *Gearns* v. *Baker*, (1875) L. R. 10 Ch. 355.

Tebb v. *Cave*, [1900] 1 Ch. 642, in which this principle was considered, was decided on other grounds, and has been since doubted in *Davis* v. *Town Properties Investment Corporation*, [1903] 1 Ch. 797.

The obligation extends to an assignee of the reversion and adjoining land. *Aldin* v. *Latimer, &c., & Co., supra; cf. Wilson* v. *Queen's Club, supra; Hall* v. *Lund*, (1863) 7 L. T. 692.

The principle of the disposition by the owner of two tenements does not enable one lessee to enforce against another a covenant, the benefit of which has not enured to him. *Master* v. *Hansard*, (1876) 4 Ch. D. 718.

CHAPTER III.

COVENANTS NOT MADE BETWEEN LANDLORD AND TENANT.

1. The Burden of the Covenant at Law.

The burden of the covenant does not run with land at law.

In cases in which the covenant is not made between landlord and tenant, the burden of the covenant does not run with land at law. *Austerberry* v. *Corporation of Oldham*, (1885) 29 Ch. D. 750, 781; *Keppell* v. *Bailey*, (1834) 2 My. & K. 517.

It has been laid down that a burden unknown to the law cannot be annexed to land and made to run with it. See *Keppell* v. *Bailey*, *supra*, 535; *per* Mellish, L.J., *Aspden* v. *Seddon*, (1876) 1 Ex. D. 509.

But a covenant may upon the true construction of it amount to a grant of an easement (*a*) or rent-charge (*b*), and so bind the land. (*a*) *Holms* v. *Seller*, (1691) 3 Lev. 305; *Rowbotham* v. *Wilson*, (1860) 8 H. L. Cas. 362; (*b*) *Morland* v. *Cook*, (1868) L. R. 6 Eq. 252; *Austerberry* v. *Corporation of Oldham*, (1885) 29 Ch. D. 750, 774; see also *Butler* v. *Archer*, (1860) 12 Ir. C. L. R. 104.

It has been held in a case in which the right to work minerals was subject to a condition of paying compensation for injury to the surface, that the condition was binding upon assigns. *Aspden* v. *Seddon*, (1876) 1 Ex. D. 496.

A covenant and grant by a purchaser of copyholds that

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the vendor, his heirs and assigns might work the mines in adjoining freeholds without being liable to make compensation for injury caused thereby, was held not to bind assigns of the enfranchised copyholds. *Richards* v. *Harper*, (1866) L. R. 1 Ex. 199.

2. The Benefit of the Covenant at Law.

The benefit of the covenant will run with land at law.

A covenant made by a purchaser with a vendor relating to land retained by him will run with that land. *Rogers* v. *Hosegood*, [1900] 2 Ch. 394, 403; see also *Austerberry* v. *Corporation of Oldham*, (1885) 29 Ch. D. 750.

It seems also that covenants entered into by a vendor in a conveyance to a purchaser (*a*) or by a stranger after the land is vested in the covenantee (*b*) will run with the land at law. Davidson Prec. Conv. (4th ed.) Vol. II., part 1, 440 n. (c) citing 9 Jarm. Byth. Sw. 355. (*a*) See *Middlemore* v. *Goodale*, (1688) Cro. Car. 503; Vin. Abr. Covenant (K) 6; *Kingdon* v. *Nottle*, (1815) 4 M. & S. 53; *King* v. *Jones*, (1814) 5 Taunt. 418; 1 Marsh. 107; in error, (1815) 4 M. & S. 188; (*b*) see *The Prior's Case*, cited *Spencer's Case*, 5 Rep. 18a; Co. Litt. 385a; *Case of the Coparceners*, cited *Spencer's Case*, 5 Rep. 18a; Co. Litt. 385a; *Sharp* v. *Waterhouse*, (1857) 7 El. & Bl. 816; *Bailey* v. *Stephens*, (1862) 12 C. B. N. S. 91, 112; but see Sugden Vendors and Purchasers (14th ed.) 587.

The benefit of a covenant may run with the land of the covenantee, though the burden of the covenant does not run with the land of the covenantor. *Rogers* v. *Hosegood*, [1900] 2 Ch. 395.

The covenant runs with the estate of covenantee.

The benefit of the covenant runs with the estate of the covenantee; and in order that the covenant may run with the land at law it is necessary that the covenantee

should have an estate at law in the land. *Rogers* v. *Hosegood*, *supra*, 404.

This may be an estate of freehold (*a*), leasehold (*b*), or copyhold land (*c*). (*a*) See *Middlemore* v. *Goodale*, *supra*; *Kingdon* v. *Nottle*, *supra*; *King* v. *Jones*, *supra*; (*b*) *Noke* v. *Awder*, (1594) Cro. Eliz. 373, 436; *Campbell* v. *Lewis*, (1820) 3 B. & Ald. 392; (*c*) *Riddell* v. *Riddell*, (1835) 7 Sim. 529; Elton Copyholds (2nd ed.) 74.

If the covenant is made with a grantee to uses the benefit of it will run with every estate which takes effect out of the seisin of the grantee. Sugden Vendors and Purchasers (14th ed.) 578; Gilbert Uses (3rd ed.) 185, n.; 1 Sand. Uses 120 (5th ed.).

If the covenant is made with *cestui que use* who takes the legal estate by force of the Statute of Uses it will run with that estate (*a*), but persons claiming under the exercise of a power which has defeated that estate cannot sue on the covenant (*b*). (*a*) Sugden Vendors and Purchasers, *supra*; (*b*) *cf.* *Roach* v. *Wadham*, (1805) 6 East, 289, which deals with the burden of such a covenant.

When the Statute of Uses transfers an estate, it transfers together with it such remedies only as by law are incident to that estate, and not collateral ones. *Bascawin* v. *Cook*, (1676) 1 Mod. 223; S. C. 2 Mod. 138; and see 1 Saund. Uses 120 (5th ed.).

The covenant must touch or concern the land of the covenantee.

The benefit of a covenant will not run with the land of the covenantee unless it touches or concerns that land. *Rogers* v. *Hosegood*, [1900] 2 Ch. 388; *Austerberry* v. *Corporation of Oldham*, (1885) 29 Ch. D. p. 776; *Ellis* v. *Mayor of Bridgnorth*, (1863) 15 C. B. N. S. 52, 78; *Bailey* v. *Stephens*, (1862) 12 C. B. N. S. 112; *Ackroyd* v. *Smith*, (1850) 10 C. B. 187.

The following covenants are examples of covenants

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which touch or concern the land of the covenantee and run with it at law.

A covenant by one of two coparceners with the other, on a partition of the land, to acquit her and her heirs of a suit that issued out of the land. *Case of the Coparceners*, cited *Spencer's Case*, 5 Rep. 18a; Co. Litt. 385a.

A covenant by a prior with the lord of a manor to celebrate Divine service in a chapel parcel of the manor. *The Prior's Case*, cited *Spencer's Case*, 5 Rep. 18a; Co. Litt. 385a.

A covenant to supply water for use at houses on the land (*a*) or for the use of cattle on the land (*b*). (*a*) *Cooke* v. *Chilcott*, (1876) 3 Ch. D. 694; considered, *Austerberry* v. *Corporation of Oldham*, (1885) 29 Ch. D. 778; (*b*) *Sharp* v. *Waterhouse*, (1857) 7 El. & Bl. 816.

A covenant restricting building upon neighbouring land. *Rogers* v. *Hosegood*, [1900] 2 Ch. 394, 403.

A covenant to produce title deeds relating to the land. *Barclay* v. *Raine*, (1823) 1 Sim. & S. 449; see now the Conveyancing Act, 1881, sect. 9.

Covenants for title.

A vendor's covenants for good right to convey (*a*), for quiet enjoyment (*b*), and for further assurance (*c*), run with the land to which they relate. (*a*) *Kingdon* v. *Nottle*, (1815) 4 M. & S. 53; (*b*) *Noke* v. *Awder*, (1594) Cro. Eliz. 373, 496; *Campbell* v. *Lewis*, (1820) 3 B. & Ald. 392; (*c*) *Middlemore* v. *Goodale*, (1638) Cro. Car. 503; see also *King* v. *Jones*, (1814) 5 Taunt. 418, 427; (1815) 4 M. & S. 188.

The benefit of a covenant implied under sect. 7 of the Conveyancing Act, 1881, runs with the estate or interest of the implied covenantee. Sect. 7 (6).

But if a conveyance passes no estate in fact or by estoppel, the benefit of covenants for title does not run to

assigns. *Onward Building Society* v. *Smithson*, [1893] 1 Ch. 1; *cf. Murphy* v. *Ford*, (1855) 5 Ir. C. L. R. 19.

An express covenant for title has been held to extend to a defect which appeared on the face of the conveyance. *Page* v. *Midland Railway Co.*, [1894] 1 Ch. 11.

Covenants for title implied under sect. 7 of the Conveyancing Act, 1881, extend to a defect of which the purchaser had notice outside the conveyance. *Great Western Railway Co.* v. *Fisher*, [1905] 1 Ch. 316.

A plaintiff who sues as assignee of the estate for a breach of covenants for title implied under sect. 7, sub-sect. 1 (a), is not affected by defences purely personal to the original covenantee. For he does not sue by reason of privity of contract, but by privity of estate, and may be in a better position at law than the covenantee through whom he claims. *David* v. *Sabin*, [1893] 1 Ch. p. 545.

Covenants implied under the Conveyancing Act, 1881, sect. 7, may be introduced into a registered disposition of land. See L. T. R. (1903), rule 99.

But in the absence of special stipulation a vendor of registered land, with an absolute title, is only required to covenant against estates and interests excluded from the effect of registration. The Land Transfer Act, 1897, sect. 16 (3).

The word "grant."

The word "grant" operates as express covenants for title in a conveyance by promoters of the undertaking under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), sect. 132, and in conveyances to the Governors of Queen Anne's Bounty under 1 & 2 Vict. c. 20, sect. 22.

Copyholds.

It has been questioned whether covenants for title to copyhold land will run with the land if they are entered

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into before the surrender. Davidson Prec. Conv. (4th ed.), Vol. II., part 1, 207.

But a covenant to surrender (*a*), and a deed conferring the right to admittance to copyhold or customary land (*b*), are conveyances within sect. 7 of the Conveyancing Act, 1881. (*a*) See sect. 2 (v.); (*b*) sect. 7 (5).

After a surrender the heir of a purchaser may sue upon the covenants for title before admittance. *Clarke* v. *Pennifather*, (1584) 4 Rep. 23b; see also Cole Ejectment, 623.

But this is not the case if upon the death of the ancestor the estate ceases, and by the custom of the manor the heir has only a right of renewal. See *Doe* d. *Dand* v. *Thompson*, (1849) 13 Q. B. 670.

3. The Burden of the Covenant in Equity.

The rule in *Tulk* v. *Moxhay*.

A Court of Equity will restrain a person who has acquired land with notice of a covenant that it shall not be used in a particular way, from breaking that covenant, though it does not run with the land at law. *Tulk* v. *Moxhay*, (1848) 2 Phil. 774.

It would be inequitable not to enforce the covenant against a purchaser with notice, for the price of the land is reduced by the existence of the covenant. See *per* Cotton, L.J., *Hall* v. *Ewin*, (1887) 37 Ch. D. p. 79.

It has been stated by Jessel, M.R., that the purchaser takes the estate subject to the equitable burden, with the qualification that if he acquires the legal estate for value without notice he is freed from the burden. That qualification, however, does not affect the nature of the burden; the notice is required merely

to avoid the effect of the legal estate, and does not create the right, and if the purchaser takes only an equitable estate he takes subject to the burden, whether he had notice or not. See *London and South Western Railway Co.* v. *Gomm*, (1882) 20 Ch. D. 583; *Rogers* v. *Hosegood*, [1900] 2 Ch. 405; *Osborne* v. *Bradley*, [1903] 2 Ch. 451; *In re Nisbet & Potts' Contract*, [1905] 1 Ch. 397; [1906] 1 Ch. 405.

"An obligation created by a restrictive covenant is in the nature of a negative easement, creating a permanent right in the person entitled to it over the land to which it relates." *In re Nisbet & Potts' Contract*, [1906] 1 Ch. 386; *London and South Western Railway Co.* v. *Gomm*, (1882) 20 Ch. D. 562, 583.

A restrictive covenant is not within the rule against perpetuities. *Mackenzie* v. *Childers*, (1889) 43 Ch. D. 265.

When the rule applies.

The doctrine of *Tulk* v. *Moxhay* is limited to restrictive stipulations, and will not be applied so as to compel a man to do that which will involve him in expense. *Haywood* v. *Brunswick Building Society*, (1881) 8 Q. B. D. 403, 410; *London and South Western Railway Co.* v. *Gomm*; (1882) 20 Ch. D. 562, 583; *Austerberry* v. *Corporation of Oldham*, (1885) 29 Ch. D. 750; *Hall* v. *Ewin*, (1887) 37 Ch. D. 79.

For assigns of the land are not liable to be sued in contract, and effect cannot be given to a covenant to spend money upon the land as against the possessor of the land. See *In re Nisbet & Potts' Contract*, [1905] 1 Ch. p. 397.

But if the covenant is in substance negative though in form affirmative, it will be enforced. *Clegg* v. *Hands*, (1890) 44 Ch. D. 503; *Catt* v. *Tourle*, (1869) L. R. 4 Ch.

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654; *Tulk* v. *Moxhay*, (1848) 2 Phil. 774; and see *infra*, p. 150.

The rule does not apply to personal or collateral covenants. A restrictive covenant is personal if the covenant is not imposed for the benefit of the covenantee's property, and assigns of the covenantee cannot then enforce it. Thus a restrictive covenant imposed by a vendor on the sale of the whole of his land is personal. *Formby* v. *Barker*, [1903] 2 Ch. 539. Whether the vendor can enforce the covenant against assigns of the purchaser. See *Ib.* p. 556.

A covenant to keep open as a garden the enclosure in the centre of a square is enforceable in equity against assigns who have acquired the land with notice of the covenant. *Tulk* v. *Moxhay*, (1848) 2 Phil. 774.

A covenant that a plot of land should not be sold but left for the common benefit of both parties and their successors, is valid, and comes within the rule. *McLean* v. *McKay*, (1873) L. R. 5 P. C. 327.

But a covenant to build on the land is not enforceable against assigns. *Haywood* v. *Brunswick Building Society*, (1881) 8 Q. B. D. 403.

A covenant not to take proceedings to restrain the use of land for a fever hospital is a personal covenant. *Groves* v. *Loomes*, (1885) 53 L. T. 592.

Who are bound by the covenant.

All persons deriving title under the covenantor with notice of the covenant, express or constructive, are bound by it, if this is the intention of the parties upon the construction of the covenant, *e.g.*, a lessee or underlessee. See *John Brothers' Abergarw Brewery Co.* v. *Holmes*, [1900] 1 Ch. 188, 196; and cases cited *supra*, p. 82.

But a restrictive covenant may be personal or may be

so framed as to exclude any person or class of persons from liability. See *In re Fawcett & Holmes*, (1889) 42 Ch. D. 150; *John Brothers' Abergarw Brewery Co.* v. *Holmes*, *supra*; *per* Byrne, J., *Holloway Brothers* v. *Hill*, [1902] 2 Ch. 612, 616.

The rule in *Tulk* v. *Moxhay* is not confined to persons deriving title under the covenantor. If a title is acquired by adverse possession under sect. 34 of the Real Property Limitation Act, 1833, as amended by the Real Property Limitation Act, 1874, prior restrictive covenants may still be enforceable against the land. *Nisbet & Potts' Contract*, [1906] 1 Ch. 386.

A squatter who has not acquired any statutory right by lapse of time is bound by the covenants during his squatting, for he is not a purchaser of a legal estate without notice. *Ib.*, [1905] 1 Ch. 399; [1906] 1 Ch. 406.

A contract to give the first refusal of land involves a negative contract not to part with the land without giving the first refusal, and may be enforced by injunction against an intending purchaser with notice of the contract, upon the principle of *Lumley* v. *Wagner*, (1852) 1 De G. M. & G. 604; see *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1901] 2 Ch. 37.

4. Notice.

Notice of a vendor's or lessor's title.

If a deed forms part of the chain of title to land, a purchaser or lessee has constructive notice of its contents, and must not rely upon any representation made by the vendor or lessor as to its effect. *Patman* v. *Harland*, (1881) 17 Ch. D. 353; *Wilson* v. *Hart*, (1866) L. R. 1 Ch. 463; distinguish *Jones* v. *Smith*, *infra*, p. 103.

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This rule has not been altered by sect. 2, sub-sect. 1, of the Vendor and Purchaser Act, 1874. *Patman* v. *Harland, supra; Thornewell* v. *Johnson,* (1881) 50 L. J. Ch. 641.

Thus, if a purchaser takes a short title, he has notice of restrictive covenants which an examination of the full title would have disclosed. *In re Nisbet & Potts' Contract,* [1905] 1 Ch. 391; [1906] 1 Ch. 386; *In re Cox & Neve's Contract,* [1891] 2 Ch. 109; see also *Peto* v. *Hammond,* (1861) 30 Beav. 495; *Robson* v. *Flight,* (1865) 4 De G. J. & S. 608.

Neither a squatter who has acquired a good title by possession, nor a purchaser from him, is exempt from this liability. *In re Nisbet & Potts' Contract,* [1906] 1 Ch. 386.

But a lessee is not affected with notice of restrictive covenants binding upon the lessor, if it appears that they would not in fact have been disclosed by an investigation of the lessor's title. *Carter* v. *Williams,* (1870) L. R. 9 Eq. 678; and see *Earl of Gainsborough* v. *Watcombe Terra Cotta Clay Co.,* (1885) 53 L. T. 116.

A grantee who holds under more than one grantor will be taken to hold under the better title, though it is subject to restrictive covenants. *John Brothers' Abergarw Brewery Co.* v. *Holmes,* [1900] 1 Ch. 188; *Roach* v. *Wadham,* (1805) 6 East, 289.

When property is sold in lots described in particulars of sale, a purchaser is only affected with notice of what concerns the lots which he bought, and is not to be taken to have read all the particulars of sale of all the lots. *Curtis* v. *Thomas,* (1875) 33 L. T. 664.

Notice of a deed is notice of its contents.

If a purchaser has notice that a deed affects the property in any way he has notice of the whole contents

of the deed, for the question of the extent to which it does affect the property is to be ascertained only by looking at the deed itself. See *Patman* v. *Harland*, (1881) 17 Ch. D. 353, 356; *English and Scottish Mercantile Investment Co.* v. *Brunton*, [1892] 2 Q. B. 700, 710; *Hooper* v. *Bromet*, (1903) 89 L. T. 37; (1904) 90 L. T. 234.

But if he is informed of the existence of an instrument which may but does not necessarily affect the property, and is informed that it does not in fact affect the property, he may accept the statement and cannot be held to have constructive notice of its contents. *English, &c., Co.* v. *Brunton, supra; Patman* v. *Harland, supra; Jones* v. *Smith*, (1841) 1 Ha. 43; (1843) 1 Phil. 244; see also *In re Alms Corn Charity*, [1901] 2 Ch. 762.

Notice by tenancy of the land.

If a tenant is in occupation of the land a purchaser is affected with constructive notice of the tenant's rights (*a*), but not of the landlord's title or rights (*b*). (*a*) *Daniels* v. *Davison*, (1809) 16 Ves. 249; (1811) 17 Ves. 433; (*b*) *Hunt* v. *Luck*, [1902] 1 Ch. 428.

If possession is vacant the purchaser has not notice of the rights of the last occupier. *Miles* v. *Langley*, (1829) 1 Russ. & M. 39; (1831) 2 Russ. & M. 626.

It seems that the doctrine of *Daniels* v. *Davison, supra*, does not apply between vendor and purchaser while the matter still rests in contract. *Caballero* v. *Henty*, (1874) L. R. 9 Ch. 447; considered, *Phillips* v. *Miller*, (1875) L. R. 10 C. P. 420.

The Conveyancing Act, 1882, sect. 3.

Constructive notice has been defined and restricted by the Conveyancing Act, 1882, sect. 3, which provides that—

(1.) "A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless—

(i.) It is within his own knowledge, or would have

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come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or

(ii.) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

(2.) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

(3.) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted.

(4.) This section applies to purchases made either before or after the commencement of this Act; save that, where an action is pending at the commencement of this Act, the rights of the parties shall not be affected by this section."

As to the meaning of purchaser see sect. 1 (4) (ii.).

"The practical result is that the law prior to the Conveyancing Act can only be used as a shield, and not treated as going beyond the law contained in the code-like definition in sect. 3." *Per* Vaughan Williams, L.J., *Hunt* v. *Luck*, [1902] 1 Ch. 435.

As to the meaning of the words "as such" in sub-sect. (ii.). See *In re Cousins*, (1886) 31 Ch. D. p. 676.

The expression "ought reasonably" in sub-sect. (i.) means "ought as a matter of prudence having regard to what is usually done by men of business under similar circumstances." *Bailey* v. *Barnes*, [1894] 1 Ch. p. 35; *Taylor* v. *London and County Banking Co.*, [1901] 2 Ch. 231, 258; see also *per* Farwell, J., *Nisbet & Potts' Contract*, [1905] 1 Ch. 400.

The fact that a solicitor acting for the vendor and purchaser proposes to insert restrictions in the conveyance does not affect the purchaser with constructive notice of restrictions which do not appear upon the abstract. *Rowell* v. *Satchell*, [1903] 2 Ch. 212.

"The plea of purchaser for value without notice is a single plea, to be proved by the person pleading it; it is not to be regarded as a plea of purchaser for value, to be met by a reply of notice." *Per* Farwell, J., *Nisbet & Potts' Contract*, [1905] 1 Ch. 402; and see [1906] 1 Ch. 404, 410.

Middlesex and Yorkshire Registries.

The registration of a deed in the Middlesex (*a*) or Yorkshire (*b*) Registry does not affect a purchaser with constructive notice of its contents unless he searches the register for the period containing the deed (*c*). (*a*) See *Morecock* v. *Dickins*, (1768) Amb. 678; *Cator* v. *Cooley*, (1785) 1 Cox, 182; *Bushell* v. *Bushell*, (1803) 1 Sch. & L. 90, 101; *In re Russell Road Purchase Moneys*, (1871) L. R. 12 Eq. 83; (*b*) *Wiseman* v. *Westland*, (1826) 1 Y. & J. 117; *Hodgson* v. *Dean*, (1825) 2 Sim. & St. 221; 48 & 49 Vict. c. 26, sect. 5; repealing 47 & 48 Vict. c. 54, sect. 15; (*c*) *Bushell* v. *Bushell*, *supra*, 103; *Hodgson* v. *Dean*, *supra*.

If a purchaser searches the register he must enquire

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for and examine deeds, memorials of which are registered. *Kettlewell* v. *Watson*, (1884) 26 Ch. D. 501, 508.

Court rolls.

A purchaser of copyholds who does not search the Court rolls has not constructive notice of their contents. *Bugden* v. *Bignold*, (1843) 2 Y. & C. C. C. 377; *Hansard* v. *Hardy*, (1812) 18 Ves. 462; but see *Pearce* v. *Newlyn*, (1818) 3 Madd. 188.

5. The Benefit of the Covenant in Equity.

The benefit of a covenant will run with land in equity.

If the benefit of a restrictive covenant has been clearly annexed to a piece of land it will run with the land in equity without proof of any bargain or representation on the assignment of the land. *Rogers* v. *Hosegood*, [1900] 2 Ch. 388.

Though a covenant is not made with a person entitled to the land at law, it may run with the land in equity. *Ib.* 404.

When the benefit of a covenant runs with land.

There is no rule that restrictive covenants imposed on a sale of land are for the benefit of property which is reserved by the vendor (*a*). Though the covenant is made with the vendor and his assigns, there is no necessary implication that an assign of land retained by the vendor is to have the benefit of the covenant (*b*). (*a*) *Keates* v. *Lyon*, (1869) L. R. 4 Ch. p. 227; *Master* v. *Hansard*, (1876) 4 Ch. D. 718; (*b*) *Renals* v. *Cowlishaw*, (1878) 9 Ch. D. 125; (1879) 11 Ch. D. 866.

If a covenant is one that is capable of running with the land it is a question of intention whether it runs with the land in equity. *Rogers* v. *Hosegood*, [1900] 2 Ch. 388.

"Where there is no indication in the original conveyance, or in the circumstances attending it, that the

burden of the restrictive covenant is imposed for the benefit of the land reserved, or any particular part of it, then it becomes necessary to examine the circumstances under which any part of the land reserved is sold, in order to see whether a benefit, not originally annexed to it, has become annexed to it on the sale, so that the purchaser is deemed to have bought it with the land, and this can hardly be the case when the purchaser did not know of the existence of the restrictive covenant. But when it has been once annexed to the land reserved, then it is not necessary to spell an intention out of surrounding facts, such as the existence of a building scheme, statements at auctions, and such like circumstances, and the presumption must be that it passes on a sale of that land, unless there is something to rebut it, and the purchaser's ignorance of the existence of the covenant does not defeat the presumption." *Rogers* v. *Hosegood*, *supra*, 408.

A purchaser of part only of the land retained by the vendor, when the covenant was entered into, must show that it was imposed for the benefit of the land which he has bought or that the benefit of the covenant was part of the subject-matter of his purchase. See *Renals* v. *Cowlishaw*, (1878) 9 Ch. D. p. 130.

In this case it may be important to consider whether the vendor has sold off part of the land retained, and if he has done so, whether or not he has sold subject to a similar covenant. See *per* Hall, V.-C., *ib.* 129.

Whether the benefit of the covenant should be expressly conveyed.

It seems that if land is sold with the benefit of a restrictive covenant, the conveyance to the purchaser should contain an assignment of the benefit of the covenant. See *Renals* v. *Cowlishaw*, (1879) 9 Ch. D. 125; (1879) 11 Ch. D. 866; *Nalder & Collyer's*

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Brewery Co. v. *Harman*, (1900) 82 L. T. p. 597; affirmed, 83 L. T. 257; *Rogers* v. *Hosegood*, *supra*, 408; see also *Tucker* v. *Vowles*, [1893] 1 Ch. 195.

Lessee of purchaser.

A lessee has been held to be entitled to the benefit of the covenant as an assign. *Taite* v. *Gosling*, (1879) 11 Ch. D. 273.

Land sold in lots. *Renals* v. *Cowlishaw*.

Restrictions are often imposed upon the use of land when an estate is sold in lots. This gives rise to the questions whether purchasers of lots and their assigns can enforce the restrictions *inter se* for their own benefit and against the vendor as to land retained by him. The law relating to this class of cases is stated in *Renals* v. *Cowlishaw*, (1878) 9 Ch. D. p. 129, where Hall, V.-C., says: "It may, I think, be considered as determined that anyone who has acquired land, being one of several lots laid out for sale as building plots, where the Court is satisfied that it was the intention that each one of the several purchasers should be bound by and should, as against the others, have the benefit of the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant; and that this right, that is, the benefit of the covenant, enures to the assign of the first purchaser; in other words, runs with the land of such purchaser. This right exists not only where the several parties execute a mutual deed of covenant, but whenever a mutual contract can be sufficiently established. A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant. And such contract need not be express, but may be collected from the transaction of sale and purchase." *Renals* v.

Cowlishaw, (1878) 9 Ch. D. 125; (1879) 11 Ch. D. 866; approved, *Spicer* v. *Martin*, (1888) 14 App. Cas. p. 24; see also *Rogers* v. *Hosegood*, [1900] 2 Ch. 408; *Nalder & Collyer's Brewery Co.* v. *Harman*, [1900] 82 L. T. 594; affirmed, 83 L. T. 257; *Nottingham Patent Brick and Tile Co.* v. *Butler*, (1885) 15 Q. B. D. 268; (1886) 16 Q. B. D. 778; *Brown* v. *Inskip*, (1884) 1 Cab. & E. 281; *Child* v. *Douglas*, (1854) Kay, 560; *Coles* v. *Sims*, (1853) Kay, 56; affirmed, (1854) 5 De G. M. & G. 1; *Whatman* v. *Gibson*, (1838) 9 Sim. 196.

Building schemes.

Where there is a building scheme the benefit of the covenants enures to purchasers without express assignment, because the true intent of the parties, and consequently the true construction of the covenant, is found by applying the words of the deed to the surrounding circumstances. *Rogers* v. *Hosegood*, [1900] 2 Ch. p. 397.

No general scheme.

Similarly, where there is no general scheme, but the covenants are similar and refer to adjacent lands. *Ib.*; *Nottingham Patent Brick and Tile Co.* v. *Butler*, (1885) 15 Q. B. D. p. 268; affirmed, (1886) 16 Q. B. D. 778.

When the doctrine of *Renals* v. *Cowlishaw* applies.

If an estate is sold at successive sales it is sometimes difficult to determine whether the principles laid down by Hall, V.-C., in *Renals* v. *Cowlishaw*, *supra*, are applicable. In *Nottingham Patent Brick and Tile Co.* v. *Butler*, (1886) 16 Q. B. D. 785, Lord Esher distinguishes between two lines of cases: (1) Where there has been a sale of part of the property, with no intention of selling the rest. Then as regards a later sale the conditions relating to it only may be looked at. (2) When the whole property is put up for sale in lots subject to restrictive covenants. It is then a question of fact whether it was

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intended that the covenants should be entered into for the benefit of all the purchasers *inter se*.

This doctrine was held to apply where the vendor desired to sell the whole property, but not at the same time; though the sales extended over a number of years, the conditions of sale were different as to different lots. Some lots were free from restriction, and lots were put up for sale subject to restrictions and afterwards sold free from restriction. *Collins* v. *Castle*, (1887) 36 Ch. D. 251, 253.

Covenants are not mutually enforceable by purchasers *inter se* if the estate, the lots, and the persons to be bound are not defined. *Osborne* v. *Bradley*, [1903] 2 Ch. 446.

A purchaser of plots on a building estate can only enforce restrictions in respect of lots shown as lotted on the plan and subject to restrictions at the sale at which he purchased. *Rowell* v. *Satchell*, [1903] 2 Ch. 212, 219.

Restrictions may be imposed for the benefit of the vendor or purchasers.

The restrictions may be imposed by the vendor for his own benefit, or for the common advantage of the several purchasers. This is a question of intention at the time when the partition of the land took place, to be gathered from any circumstances which can throw light upon what the intention was. See *per* Wills, J., *Nottingham Patent Brick and Tile Co.* v. *Butler*, (1885) 15 Q. B. D. 268; *per* Hall, V.-C., *Renals* v. *Cowlishaw*, (1878) 9 Ch. D. 129; *In re Birmingham and District Land Co. & Allday*, [1893] 1 Ch. 342; *Sheppard* v. *Gilmore*, (1887) 57 L. T. 614.

Evidence of intention.

(i.) Land retained by the vendor.

The retainer by the vendor of part of the property is only an element to be taken into consideration in ascertaining the intention. Though the vendor retains part of the estate there may be circumstances which show an

intention that the covenants should be enforceable by purchasers against each other and against the vendor. *In re Birmingham and District Land Co. & Allday, supra.*

The fact that the vendor reserves no part of the estate is almost conclusive that the covenants are intended for the benefit of the purchasers, and the inference is the same where the whole estate is put up for sale by auction, though a number of lots remain unsold. See *Nottingham, &c., Co.* v. *Butler,* (1886) 16 Q. B. D. p. 785; *ib.* 15 Q. B. D. p. 269.

(ii.) Purchaser's ignorance of the existence of the restrictions.

The fact that the purchasers were not aware of the existence of the covenants is almost conclusive evidence that the covenants were not entered into for their benefit. *Osborne* v. *Bradley,* [1903] 2 Ch. p. 455; *Nottingham Patent, &c., Co.* v. *Butler, supra,* p. 269.

(iii.) Power to vary conditions as to lots unsold.

A clause permitting the variation of the conditions may be important in determining whether the intention was that purchasers should be bound *inter se. Per* Vaughan Williams, L.J., *Hooper* v. *Bromet,* (1904) 90 L. T. p. 237; *Osborne* v. *Bradley,* [1903] 2 Ch. 453; *cf. A.-G.* v. *Mayor, &c., of Richmond,* (1903) 89 L. T. 700.

(iv.) Building scheme.

That the several lots have been laid out for sale as building lots is cogent evidence of an intention that the covenants shall be for the common benefit of purchasers. *Nottingham Patent, &c., Co.* v. *Butler, supra,* 269.

If the land is put up for sale by auction in building lots, according to a plan, and if the conditions of sale prescribe that houses of a certain character only shall be built, and that every purchaser shall bind himself by a restrictive covenant, each purchaser, as against the vendor, and as against every co-purchaser, has a right to the benefit of the covenant, although there may have been no direct stipulation to that effect, and no

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express provision for mutual covenants by the purchasers *inter se*. *Spicer* v. *Martin*, (1888) 14 App. Cas. 24; *In re Birmingham, &c., Co. & Allday*, [1893] 1 Ch. 342.

This rule applies when the sales are by private contract. See *Spicer* v. *Martin*, *supra*, 25.

The essence of the building scheme doctrine is that each purchaser is entitled to enforce the covenants as against every other. A purchaser has not the benefit of the covenants against another who could not sue him. *Nalder & Collyer's Brewery Co.* v. *Harman*, (1900) 82 L. T. 594; 83 L. T. 257.

But a vendor may transfer to purchasers the benefit of a restrictive covenant entered into with him on a former sale of neighbouring land. *Ib.*

A purchaser of a lot which is sold free from the restrictions can enforce them. *Collins* v. *Castle*, (1887) 36 Ch. D. 253.

A purchaser can enforce the stipulations of a building scheme, although his conveyance contains a departure from them. *Rowell* v. *Satchell*, [1903] 2 Ch. 212.

To prove the existence of a building scheme the exhibition to intending purchasers of a plan embodying such a scheme, together with particulars and conditions of sale, and the conveyances to purchasers containing the restrictions have often been relied on. See *Nottingham, &c.* v. *Butler*, (1885) 15 Q. B. D. p. 269; *Peacock* v. *Penson*, (1848) 11 Beav. 355; *Tindall* v. *Castle*, (1893) 62 L. J. Ch. 555; *Spicer* v. *Martin*, (1888) 14 App. Cas. 12; *In re Birmingham and District Land Co. & Allday*, [1893] 1 Ch. 342; *Nalder & Collyer's Brewery Co.* v. *Harman*, (1900) 83 L. T. 257, 259.

But an intending purchaser who is shown a plan of

the estate marked out in lots, and a printed form of agreement containing restrictions on the use of the land, is not entitled to assume that the estate is governed by a building scheme. *Tucker* v. *Vowles*, [1893] 1 Ch. 195, 208.

The building scheme doctrine has been applied between purchasers of small pieces of land delineated on a separate part of the sale plan, a number of other lots being sold at the same time by the same vendors and in the same town. *Goddard* v. *Midland Railway Co.*, (1891) 8 Times Rep. 126.

Lots subdivided.

When a purchaser of land, which is governed by a building scheme, subdivides his purchase into small lots and sells subject to new restrictions, the sub-purchasers as between themselves are governed by the sub-scheme. *Knight* v. *Simmonds*, [1896] 1 Ch. 653; 2 Ch. 294.

A purchaser who has bought a lot on the sale of a building estate, which is subject to restrictive covenants cannot enforce the restrictions against a sub-purchaser of part of the lot. *King* v. *Dickeson*, (1889) 40 Ch. D. 596.

The right of a vendor to enforce the restrictions.

A vendor is entitled to enforce a restrictive covenant entered into with him as owner of an estate, though he has parted with the whole estate, if he still has an interest in enforcing it, or is likely to be injured by its breach. *Spencer* v. *Bailey*, (1893) 69 L. T. 179; see also *The Merchant Venturers of Bristol* v. *Bridges*, (1886) 2 Times Rep. 726.

If the covenant is imposed on the sale of all the vendor's land to a purchaser, the benefit of it does not enure to assigns of the vendor, and his personal representatives cannot enforce it, if it is infringed after his death. *Formby* v. *Barker*, [1903] 2 Ch. 539.

6. The Obligation of a Vendor to Observe Restrictions Imposed by Him.

A vendor may be bound who has not covenanted.

A vendor who has put an estate on the market as subject to restrictive covenants may be bound to observe the restrictions, though he has not entered into any covenant with a purchaser to do so. For if a vendor invites the public to come in and take a portion of an estate which is bound by one general law, he or his representatives will not be permitted to destroy the value of the thing he sold by authorising the use of part of the estate for a purpose inconsistent with the law by which he professed to bind the whole. *Spicer* v. *Martin*, (1888) 14 App. Cas. p. 25; *Mackenzie* v. *Childers*, (1889) 43 Ch. D. 265; *In re Birmingham and District Land Co. and Allday*, [1893] 1 Ch. 342; *Davis* v. *Corporation of Leicester*, [1894] 2 Ch. 208; *Deane* v. *The Corporation of Ramsgate*, (1892) 8 Times Rep. 199.

Particulars and conditions of sale may constitute such an invitation to the public. *In re Birmingham, &c., and Allday, supra; Davis* v. *Corporation of Leicester, supra; Holford* v. *Acton Urban Council*, [1898] 2 Ch. 240.

The vendor remains bound by the conditions of sale without covenanting to observe the restrictions. See *Davis* v. *Corporation of Leicester, supra.*

But a purchaser can compel the vendor to enter into an express covenant with him to observe restrictions which have been held out to purchasers as binding the property. See *In re Birmingham, &c., and Allday, supra.*

Similarly, a vendor may be bound when the restrictions are contained in a deed of covenant, though he has not entered into any express covenant. *Mackenzie* v. *Childers*, (1889) 43 Ch. D. 265.

A municipal corporation is not bound by restrictions, imposed by them on a sale of land, unless the restrictions have been approved by the Treasury in accordance with the Municipal Corporation Act, 1882 (45 & 46 Vict. c. 50), sect. 109; *Davis* v. *Corporation of Leicester*, [1894] 2 Ch. 208.

The doctrine laid down in *Spicer* v. *Martin*, (1888) 14 App. Cas. 12, is not applicable when the course of dealing with the property shows no uniformity of purpose. *Graham* v. *Craig*, [1902] 1 Ir. R. 264.

Sale plan exhibited to purchasers.

If a plan of the estate is held out to purchasers as showing provisions of a building scheme, it is not competent for the vendor to alter what was proposed in the plan. *Tindall* v. *Castle*, (1893) 62 L. J. Ch. 555; *Peacock* v. *Penson*, (1848) 11 Beav. p. 361.

But the mere exhibition of a plan at the time of the sale of land does not amount to an engagement that all that is exhibited on the plan shall be done. *Feoffees of Heriot's Hospital* v. *Gibson*, (1814) 2 Dow, 301; *Whitehouse* v. *Hugh*, [1906] 1 Ch. p. 260; affirmed, [1906] 2 Ch. 283.

A plan which shows a vacant space, not marked as a road, does not amount to a representation that the land shall always remain vacant. *Whitehouse* v. *Hugh*, [1906] 1 Ch. 253; affirmed, [1906] 2 Ch. 283.

The words "proposed road" are merely descriptive. See *In re School Board for London and Foster*, [1903] 87 L. T. 700; but see *Gogarty* v. *Hoskins*, [1906] 1 Ir. R. 173.

There are cases in which a grant of a right of way has been implied from the abuttals and plan. See *Gogarty* v. *Hoskins*, [1906] 1 Ir. R. 173; *Espley* v. *Wilkes*, (1872) L. R. 7 Ex. 298; Gale Easements, 97 (7th ed.).

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Power to vary plans and conditions.

A vendor may reserve power in the conditions of sale to deal with lots unsold at an auction under different conditions (*a*), or to waive or alter any of the stipulations as to land sold, with the consent of the purchaser (*b*), or allow others to make alterations in the plan and conditions (*c*). (*a*) *Sidney* v. *Clarkson*, (1865) 35 Beav. 118; *Hooper* v. *Bromet*, (1904) 90 L. T. 234; (*b*) *A.-G.* v. *Mayor, &c., of Richmond, &c.*, (1903) 89 L. T. 700; (*c*) *Whitehouse* v. *Hugh*, [1906] 1 Ch. 253, 261; affirmed, [1906] 2 Ch. 283; *Hooper* v. *Bromet*, *supra*; see also *Schreiber* v. *Creed*, (1839) 10 Sim. 9.

Derogation.

The grantor of land to be used for a particular purpose is under an obligation to abstain from doing anything on adjoining property belonging to him which would prevent the land granted from being used for the purpose for which the grant was made. *Siddons* v. *Short*, (1877) 2 C. P. D. 572, and cases cited *supra*, p. 92; distinguish *Popplewell* v. *Hodkinson*, (1869) L. R. 4 Ex. 248.

7. Stipulations Implied.

"Where a contract as expressed in writing would be futile, and would not carry out the intention of the parties, the law will imply any term obviously intended by the parties which is necessary to make the contract effectual." *Per* Bowen, L.J., *Oriental Steamship Co.* v. *Taylor*, [1893] 2 Q. B. p. 527; see also *Leader* v. *Moody*, (1875) L. R. 20 Eq. 145; *Hudson* v. *Cripps*, [1896] 1 Ch. 265.

But where conditions of sale provided that purchasers should covenant with the vendor to erect shops and dwelling-houses, the Court refused to imply a negative

stipulation that nothing but shops and dwelling-houses should be erected. *Holford* v. *Acton Urban Council*, [1898] 2 Ch. 240; see also *Hawes* v. *Scott*, (1896) 40 Sol. J. 373; *Wright* v. *Berry*, (1903) 19 Times Rep. 259.

8. Covenants for Securing the Payment of a Rent-charge.

The burden of the covenant.

If the owner of the land out of which the rent-charge issues covenants with the owner of the rent-charge to pay the rent or to build houses on the land for better securing the rent, the burden of the covenant does not run with the land at law or in equity. *Haywood* v. *Brunswick Permanent Benefit Building Society*, (1881) 8 Q. B. D. 403; *Austerberry* v. *Corporation of Oldham*, (1885) 29 Ch. D. 750.

But it has been stated in some cases that a stipulation which is part of the grant of the rent-charge is binding upon assigns. See *Austerberry* v. *Corporation of Oldham*, *supra*, p. 785; *Butler* v. *Archer*, (1860) 12 Ir. C. L. R. 104; *Brewster* v. *Kidgill*, (1697) 12 Mod. 166.

Whether an assignee of the covenantor might be compelled to allow the land to be built on by the covenantor. See *Andrew* v. *Aitken*, (1882) 22 Ch. D. 218.

If part of the land out of which the rent issues is sold, a vendor's covenant that it shall be discharged of the rent is a personal covenant and does not charge and run with the land retained. *Cook* v. *Arundel*, (1656) 1 Eq. Ca. Ab. 26; Hardr. 87.

The benefit of the covenant.

If land is limited to the use that the grantor may receive a rent-charge and subject thereto to the grantee in fee and the grantee covenants to pay the rent, the

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benefit of the covenant does not run with the rent. *Milnes* v. *Branch*, (1816) 5 M. & S. 411; *Haywood* v. *Brunswick Building Society*, (1881) 8 Q. B. D. p. 407; see also *Randall* v. *Rigby*, (1838) 4 M. & W. 130, 135.

If the freeholder grants a rent-charge issuing out of the land and covenants to pay it, it is uncertain whether the benefit of the covenant runs with the rent. See Sugden Vendors and Purchasers (14th ed.) 591; *Brewster* v. *Kidgill*, (1697) 12 Mod. p. 170; *Milnes* v. *Branch*, (1816) 5 M. & S. p. 417; *Kennedy* v. *Stewart*, (1836) 4 Law Rec. N. S. 160; *S. C.* 7 Ir. L. R. 421, n.; *Austerberry* v. *Corporation of Oldham*, (1885) 29 Ch. D. p. 785.

Other remedies of a grantee of a rent-charge.

The remedy by covenant for recovery of a rent-charge is therefore ineffectual against assigns of the land. A grantee of a rent-charge has, however, other remedies. An action of debt for non-payment of a rent-charge may be brought against the terre-tenant, if the land is freehold (*a*), but not if it is leasehold (*b*). (*a*) *Thomas* v. *Sylvester*, (1873) L. R. 8 Q. B. 368; (*b*) *In re Herbage Rents*, [1896] 2 Ch. 811.

Remedies for recovery of a rent-charge are also given by sect. 44 of the Conveyancing Act, 1881; but only so far as those remedies might have been conferred by the instrument under which the rent-charge arises.

These remedies apply to a rent-charge reserved on a grant for building purposes under the Settled Land Acts. See the Act of 1890, sect. 9.

Power to distrain for rent-seck is given by 4 Geo. II. c. 28, sect. 5.

Moreover, the Court has jurisdiction to order a sale or mortgage of the land to raise arrears of a rent-charge. See *Hambro* v. *Hambro*, [1894] 2 Ch. 564; *Blackburne* v. *Hope-Edwards*, [1901] 1 Ch. p. 423.

If a term of years is limited to trustees as security for payment of a rent-charge and there is a trust to raise arrears by sale or mortgage of the term, the owner of the rent-charge is not entitled to an order for sale of the fee simple. *Blackburne* v. *Hope-Edwards*, [1901] 1 Ch. 419.

As to powers of re-entry on non-payment of a rent-charge. See 17 Law Quarterly Review, 32.

9. Affirmative Covenants.

Various methods have been proposed by which affirmative covenants may be made to run with the land and negative covenants may be made enforceable against a grantee who has acquired the legal estate without notice of the covenant.

(1) A rent-charge may be limited issuing out of the land of the covenantor. *Austerberry* v. *Corporation of Oldham*, (1885) 29 Ch. D. p. 783.

This should conform to the rule against perpetuities. *London and South Western Railway Co.* v. *Gomm*, (1882) 20 Ch. D. 562; Lewis Perpetuities, 613; see also *Morgan* v. *Davey*, (1883) 1 Cab. & E. 114.

(2) It appears that the Conveyancing Act, 1881, sect. 65, sub-sect. 4, may be used to annex to the fee simple covenants which would not run with the land at common law. Challis Real Property (2nd ed.), 306.

These matters will be found considered in detail in the notes to Key and Elphinstone Prec. 316 (8th ed. 1904).

As to the effect of a conveyance to the use that a trade shall not be carried on upon land see *Hodson* v. *Coppard*, (1860) 29 Beav. 4.

10. Powers of Re-entry.

A power of re-entry is sometimes inserted in a conveyance in fee, enabling the vendor to re-enter if default is made in performing or observing the purchaser's covenants. It has been held that this is a proper provision for securing the due observance and performance of building covenants. *Ex parte Ralph*, (1845) 1 De G. (Ca. in Bank.) 219.

Regularly, a right of re-entry must be as of the old estate. Co. Litt. 202a; *Doe* v. *Bateman*, (1818) 2 B. & Ald. p. 170; *Formby* v. *Barker*, [1903] 2 Ch. 545.

A right of entry cannot be reserved to a stranger to the estate. *Doe* d. *Barber* v. *Lawrence*, (1811) 4 Taunt. 23; Litt. sect. 347; Shepp. Touch. 149; and cases cited Cole Ejectment, 404.

A proviso for re-entry is valid upon a grant in fee rendering rent (*a*); or upon an assignment of a term of years (*b*), though not incident to a reversion. (*a*) Litt. sect. 325; (*b*) *Doe* v. *Bateman*, (1818) 2 B. & Ald. 168.

At common law no one may take advantage of a condition except the person making it, or his privies in right and representation, *i.e.*, his heirs, executors, or administrators, and the successors of corporations sole. Assigns cannot take the benefit of a condition. Shepp. Touch. 149; Co. Litt. 215b.

But the statute 8 & 9 Vict. c. 106, sect. 6, provides that a right of re-entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England of any tenure, may be disposed of by deed.

This section does not apply to a right of entry for condition broken. *Hunt* v. *Bishop*, (1858) 8 Ex. 675;

Hunt v. *Remnant*, (1854) 9 Ex. 635; *Bennett* v. *Herring*, (1857) 3 C. B. N. S. 370; *Jenkins* v. *Jones*, (1882) 9 Q. B. D. p. 131.

By the Wills Act, 1837, sect. 3, all rights of entry for conditions broken and other rights of entry may be disposed of by will. Considered, *Pemberton* v. *Barnes*, [1899] 1 Ch. 549.

A power of re-entry on breach of a restrictive covenant must conform to the rule against perpetuities. *Dunn* v. *Flood*, (1883) 25 Ch. D. 629; (1885) 28 Ch. D. 586; considered, *Hollis' Hospital and Hague's Contract*, [1899] 2 Ch. 554.

11. Covenants in Mortgages.

A covenant by a mortgagor with the mortgagee to pay the mortgage money is collateral. See *Canham* v. *Rust*, (1818) 2 Moore, 164.

The assignment of an equity of redemption does not create any liability on the part of the assignee to perform the mortgagor's covenant to pay interest. *In re Errington*, [1894] 1 Q. B. 11.

But the vendor of an equity of redemption is entitled to an express covenant by the purchaser to indemnify him against the mortgage debt, though this is not provided for by the contract (*a*). A covenant to indemnify is implied by law where there is no express covenant (*b*). (*a*) *Bridgman* v. *Daw*, (1891) 40 W. R. 253; (*b*) *Adair* v. *Carden*, [1892] 29 L. R. Ir. 469; *per* Lord Eldon, *Waring* v. *Ward*, (1802) 7 Ves. 337.

The implied covenant is not excluded by a provision in the conveyance to the purchaser, by which the lands conveyed are made primarily liable to the mortgage in

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exoneration of other lands of the vendor affected by it. *Adair* v. *Carden, supra.*

The purchaser's covenant does not make his estate the proper fund for payment of the mortgage, but only amounts to an obligation, as between him and the person selling to him, to indemnify the latter. *Barry* v. *Harding*, (1844) 1 J. & Lat. p. 485; *Woods* v. *Huntingford*, (1796) 3 Ves. 131.

The benefit of covenants for title implied in a conveyance by way of mortgage under sect. 7 of the Conveyancing Act, 1881, goes with the estate of the covenantee. Sect. 7, sub-sect. 6.

A covenant by a mortgagor tying a mortgaged public-house to the mortgagee's brewery may be valid if limited to the continuance of the security. *Biggs* v. *Hoddinott*, [1898] 2 Ch. 307; approved, *Noakes & Co., Limited* v. *Rice*, [1902] A. C. 33, 36.

But a covenant by a mortgagor of a leasehold public-house to deal exclusively with the mortgagee during the continuance of the term is a clog on the equity of redemption. *Noakes & Co., Limited* v. *Rice, supra;* see also *Samuel* v. *Jarrah Timber, &c., Corporation, Limited*, [1904] A. C. 323.

12. Personal Chattels.

A covenant will not run with a personal chattel (*a*). Thus, a covenant to pay freight to the owner of a ship is not transferred to an assignee of the ship by an assignment of the property in the ship (*b*). (*a*) *Cf. Bouls* v. *Horton*, (1672) Free. K. B. 57; (*b*) *Splidt* v. *Bowles*, (1808) 10 East, 279.

But when moveable property is acquired with notice of a contract entered into by the person disposing of it

for its use in a particular manner, the person taking it with such notice may be restrained from using it otherwise. *De Mattos* v. *Gibson*, (1858) 4 De G. & J. 276, 282; *The Messageries Imperiales* v. *Baines*, (1863) 11 W. R. 322. Chap. III.

De Mattos v. *Gibson*, *supra*, does not show that the doctrine of *Tulk* v. *Moxhay*, (1848) 2 Phil. 744, applies to personal property; the basis of the statement of Knight Bruce, L.J., is rather the principle of *Lumley* v. *Wagner*, (1852) 1 De G. M. & G. 604, than that of *Tulk* v. *Moxhay*. *Formby* v. *Barker*, [1903] 2 Ch. p. 553.

A contract whereby a charge or incumbrance is imposed upon personal property is binding upon assigns who take with notice of the contract. See *Werderman* v. *Société Générale d'Électricité*, (1881) 19 Ch. D. 246; *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.*, [1902] 1 Ch. 157.

Conditions cannot be attached to goods in general so as to follow the goods (*a*); but to a patented article conditions may be attached (*b*). (*a*) *Taddy & Co.* v. *Sterions & Co.*, [1904] 1 Ch. 354; *McGruther* v. *Pitcher*, [1904] 2 Ch. 306; (*b*) *Badische Anilin und Soda Fabrik* v. *Isler*, [1906] 1 Ch. p. 611.

Goodwill.

The benefit of a publican's covenant to deal exclusively with a firm of brewers will run with the business, if upon the construction of the covenant this appears to have been the intention of the parties. *John Brothers' Abergarw Brewery Co.* v. *Holmes*, [1900] 1 Ch. 188, 195; see also *supra*, p. 84.

The following cases deal with personal contracts running with goodwill. *Jacoby* v. *Whitmore*, (1883) 49 L. T. 335; 32 W. R. 18; *Benwell* v. *Innes*, (1857) 24 Beav. 307; *Davies* v. *Davies*, (1887) 36 Ch. D. p. 388;

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Baines v. *Geary*, (1887) 35 Ch. D. p. 159; *Showell* v. *Winkup*, (1889) 60 L. T. 389; *Smith* v. *Hawthorne*, (1897) 76 L. T. 716; *Townsend* v. *Jarman*, [1900] 2 Ch. 698; *Welstead* v. *Hadley*, [1904] 2 Times Rep. 165; *Hinkins* v. *Alder*, (1906) 50 Sol. J. 258.

A covenant not to carry on a particular trade upon land is not an unreasonable restraint of trade, though unlimited in point of time. *Catt* v. *Tourle*, (1869) L. R. 4 Ch. 654, 659; *Earl of Zetland* v. *Hislop*, (1882) 7 App. Cas. 427.

CHAPTER IV.

OF THE CONSTRUCTION OF RESTRICTIVE COVENANTS AND WHAT CONSTITUTES A BREACH OF THE COVENANT.

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Rules of construction.

In construing covenants, the fulfilment of the evident intent and meaning of the parties is the design of Courts of law and equity. They do not confine themselves within the limits of a literal interpretation, but contemplate the whole scope and object of the deed. Platt Covenants, 136; and see *Earl of Pembroke* v. *Warren*, [1896] 1 Ir. R. 107; *Rolls* v. *Miller*, (1884) 27 Ch. D. p. 87.

Four rules of construction are given by Platt, pp. 136 *et seq.*, which are in effect: (i.) That covenants shall be so expounded as to carry into effect the intention of the parties. This intention is to be collected from the entire context; and it is immaterial in what part of a deed any particular covenant may be inserted. (ii.) The end of a good construction is to supply the defects of expression, and to prevent the evasion of the covenant by the covenantor, in consequence of the obscure wording of the deed. Ambiguous words are, therefore, to be taken most strongly against the covenantor. (iii.) Exposition shall be made of the deed, so as to support, rather than annul the transaction. (iv.) When no time is limited for the doing of the thing, it shall be done in a reasonable time.

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A restrictive covenant as to letting or user of property will be construed strictly; the Court will not extend it on the ground of presumed intention. *Brigg* v. *Thornton*, [1904] 1 Ch. 386; *German* v. *Chapman*, (1877) 7 Ch. D. p. 276.

Parol evidence is not admissible for the purpose of construing or explaining a covenant, if there is no latent ambiguity in the covenant. Thus, parol evidence was not admitted to show whether the parties intended a piece of land to be subject to a restrictive covenant. *The Mayor of London* v. *Sandon*, (1872) 26 L. T. N. S. 86.

1. Covenants to Use Land for a particular Purpose only.

Private residence.

A purchaser frequently covenants to use the property for the purpose of a private residence only.

Carrying on a school for girls has been held to be a breach of covenants of this nature. *Wickenden* v. *Webster*, (1856) 6 El. & Bl. 387; *Johnstone* v. *Hall*, (1856) 2 K. & J. 414.

In *Hobson* v. *Tulloch*, [1898] 1 Ch. 424, the defendant intended using a house for herself and family, for governesses at a school in the neighbourhood, and for the board and lodging of a limited number of scholars attending the school. This was held to be within a covenant not to use the house for any other purpose than a private residence.

In *Porter* v. *Gibbons & Bisset*, (1904) 48 Sol. J. 559, the defendant had taken to live with her various friends; but had not made a business of letting rooms, nor sought to make any profit. Kekewich, J., held that

this was not a breach of a covenant that the premises were not to be used except as a private dwelling-house.

In *German* v. *Chapman*, (1877) 7 Ch. D. 271, the covenant prohibited the use of buildings otherwise than for a private residence only, and not for any purpose of trade. It was held that user for the education and lodging of 100 girls in connection with a charitable institution would come within the covenant.

An auction sale on the premises of furniture belonging to the house is not within such a covenant. *Reeves* v. *Cattell*, (1876) 24 W. R. 485.

In *Worsley* v. *Swann*, (1882) 51 L. J. Ch. 576, the covenant provided that any building erected on the land should not be used otherwise than for a private dwelling-house. The defendant commenced building a circus, and had entered into an agreement to let the circus when completed. The Court of Appeal held that an injunction restraining the defendant from erecting a circus and any building on the land contrary to the covenants was erroneous.

Shop.

In *Coombs* v. *Cook*, (1883) 1 Cab. & E. 75, property was to be used wholly for private houses except one part which was allowed to be used for shops. It was held that the word "shop" did not include a tavern.

Similarly, in *Hall* v. *Box*, (1870) 18 W. R. 820, a purchaser of a plot set apart for shops was restrained from building a public-house on it.

In *Formby* v. *Barker*, [1903] 2 Ch. 539, a purchaser covenanted not to build "any beerhouse or shop or any hotel of less annual value than 50*l*." This was held not to apply to a shop which was wholly unconnected with beer.

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It appears that the conversion of a private dwelling-house into a shop may be effected without structural alteration. *Wilkinson* v. *Rogers*, (1864) 2 De G. J. & S. 62; 10 Jur. N. S. 162.

Boxing entertainments are not within the scope of the business of a private club. *Seaward* v. *Paterson*, (1896) 12 Times Rep. 525.

The issue of excise licences does not infringe a covenant to use only as a post office. *Wadham* v. *Postmaster-General*, (1871) L. R. 6 Q. B. 644.

Grant for particular purpose only.

The words of a grant of land to be used for a particular purpose only have been held to amount to a covenant to use the land for that purpose only. *Williamson* v. *Corporation of Sunderland*, (1892) 9 Times Rep. 143; *Hodson* v. *Coppard*, (1860) 29 Beav. 4; *cf. Kehoe* v. *Marquess of Lansdowne*, [1893] A. C. p. 458.

2. Covenants Restricting the Carrying on of Trades and Businesses.

Not to use except for a named business.

An agreement not to use land except for a particular trade does not amount to an agreement to carry on that trade upon the land. *Doe* d. *The Marquis of Bute* v. *Guest*, (1846) 15 M. & W. 160.

It has been held that a proviso that it should be lawful for a lessee to open a butcher's shop did not amount to a covenant that this might be done without interference from any person, but was a licence or contract protecting the lessee against the acts of his lessor and those claiming under him. *Doyle* v. *Hort*, (1878) 4 L. R. Ir. 455.

Meaning of trade and business.

A distinction has been drawn between a trade and a business. A trade is conducted by buying and selling (*a*); but the word "business" comprises occupations which are

not carried on by an open exhibition of buying and selling (*b*). It is not essential that there should be payments in order to constitute a business; but payment does not necessarily make an occupation a business (*c*). It seems that the word "business" means almost anything which is an occupation as distinguished from a pleasure (*d*). (*a*) *Doe* v. *Bird*, (1834) 2 A. & E. 161; (*b*) *Doe* d. *Bish* v. *Keeling*, (1813) 1 M. & S. 95, 100; (*c*) *Rolls* v. *Miller*, (1884) 27 Ch. D. 85; *Bramwell* v. *Lacy*, (1879) 10 Ch. D 691; (*d*) *per* Lindley, L.J., *Rolls* v. *Miller*, *supra*, 88.

It has been held that carrying on a boys' school is a "business" (*a*), and carrying on a girls' school is a "business or calling" (*b*). (*a*) *Doe* d. *Bish* v. *Keeling*, *supra*; (*b*) *Kemp* v. *Sober*, (1851) 1 Sim. N. S. 517.

In *Rolls* v. *Miller*, (1884) *supra*, the use of a house as a charitable home was held to be carrying on the business of a lodging-house.

In *Bramwell* v. *Lacy*, (1879) 10 Ch. D. 691, carrying on a hospital for poor persons, where the patients made small payments, was held to be a business.

In *Evans* v. *Davis*, (1878) 10 Ch. D. 747, window blinds and a brass plate marked with the name of a firm were held to constitute an "outward mark or show of business."

An auctioneer does not carry on a trade. *Cf. Wheatley* v. *Smithers*, [1906] 2 K. B. 321.

Occupation.

In *Portman* v. *Home Hospital Association*, (1879) 27 Ch. D. 81, n., Jessel, M.R., held that the user of a house for the purpose of a hospital was user in the exercise or carrying on of an occupation and within the meaning of a covenant prohibiting any "art, trade, or business, occupation, or calling whatsoever."

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Similar business.

In the case of a covenant not to carry on a similar business to that of the covenantee the point to be considered is whether the defendant's business is sufficiently like the plaintiff's business to compete with it. *Drew* v. *Guy*, [1894] 3 Ch. 25.

In *Drew* v. *Guy* the defendant was bound by a covenant not to carry on the business of keeper of a restaurant similar to that carried on by the tenant of a neighbouring public-house. The defendant was carrying on the general business of a restaurant without a licence, but his restaurant was in much smaller premises than that adjoining the public-house, which was of a superior description to the defendant's and likely to attract a different class of customers. The Court of Appeal held that the defendant's business was similar to that carried on by the tenant of the public-house.

Not to carry on a named trade.

If the covenant prohibits the carrying on of some specified trade upon the property, it is broken by carrying on that trade as ancillary to another trade. *Fitz* v. *Iles*, [1893] 1 Ch. 77 ; *Buckle* v. *Fredericks*, (1890) 44 Ch. D. 244.

In *Fitz* v. *Iles* the defendants, who were grocers, were bound by a covenant not to use a house as a coffee-house nor "for any other trade or business than that of a tea and coffee dealer and for the sale of non-intoxicating refreshments." They proposed as ancillary to their business to sell light refreshments, consisting of cups of tea, coffee, &c., to be consumed on the premises. The Court of Appeal held that they were carrying on the business of a coffee-house keeper, and granted an injunction.

In *Buckle* v. *Fredericks*, *supra*, the sale of wine, spirits, and beer by a theatrical manager at the refreshment

bars of a theatre was held to infringe a covenant not to carry on the trade of a "retailer of wine, spirits, and beer."

Overlapping trades.

But when the trades of the plaintiff and defendant overlap, a covenant not to carry on the plaintiff's trade is not broken by the *bonâ fide* sales by the defendant of certain articles the sale of which forms part of the plaintiff's trade. If the defendant is substantially carrying on the plaintiff's trade, and the sale by him of articles not sold by the plaintiff is merely colourable, that will not protect him. *Stuart* v. *Diplock*, (1889) 43 Ch. D. 343.

In *Stuart* v. *Diplock*, the Court of Appeal held that the *bonâ fide* sale by hosiers of certain articles of hosiery, the sale of which was an essential and important part of the business of ladies' outfitters, did not infringe a covenant not to carry on the business of ladies' outfitting.

The sale by a grocer and tea dealer of a particular kind of sweetmeat in which confectioners deal does not infringe a covenant not to carry on the business of a wholesale or retail confectioner. *Lumley* v. *The Metropolitan Railway Co.*, (1876) 34 L. T. 774.

It seems that a covenant not to sell articles usually sold in the plaintiff's trade would prevent the sale of any such articles by the defendant in the course of another trade. *Stuart* v. *Diplock*, *supra*, p. 351; *Feilden* v. *Slater*, (1869) L. R. 7 Eq. 523; *per* Bramwell, B., *Lumley* v. *Metropolitan Railway Co.*, *supra*.

The grant of a lease for the business of a stationer is a breach of a covenant not to let for the business of an artistic and heraldic stationer. *Brigg* v. *Thornton*, [1904] 1 Ch. 886.

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Carrying on part of a business.

In *Bailey* v. *Skinner, &c.*, (1898) 42 Sol. J. 780, the covenant prohibited the business of a general draper. The defendants traded as "The Scotch Wool and Hosiery Stores," and practically all the articles in which they dealt were sold by general drapers. But Channell, J., considered that they could not be said to carry on the business of a general draper, and refused to grant an interlocutory injunction.

To be within a covenant not to carry on a trade it is not necessary that the defendant should carry on every branch of the trade. See *Doe* d. *Gaskell* v. *Spry*, (1818) 1 B. & Ald. 619.

A covenant not to exercise the trade of a butcher is broken by selling raw meat on the premises, although no beasts are slaughtered there. *Doe* d. *Gaskell* v. *Spry*, *supra*; but see *Cleaver* v. *Bacon*, (1887) 4 Times Rep. 27.

Offensive trades and businesses.

The word "offensive" has no definite legal meaning. In construing a covenant not to carry on any offensive trade much depends on the situation of the property. The nature and purpose of the letting are also to be considered, and whether any such trade was carried on upon the premises at the time of granting the lease. *Gutteridge* v. *Munyard*, (1834) 7 Car. & P. 129; *Earl of Pembroke* v. *Warren*, [1896] 1 Ir. R. 76; *Duke of Devonshire* v. *Brookshaw*, (1899) 81 L. T. 83.

Some trades are necessarily offensive; others can be carried on without giving offence, but become offensive unless carried on with great care. *Duke of Devonshire* v. *Brookshaw*, *supra*, p. 84.

In *Earl of Pembroke* v. *Warren*, *supra*, a private hospital carried on in Fitzwilliam Square, Dublin, was held to be offensive.

In *Tod-Heatly* v. *Benham*, (1888) 40 Ch. D. 80, the case

was decided upon the general words of the covenant, but Cotton, L.J., considered that a hospital was not offensive.

In *Duke of Devonshire* v. *Brookshaw*, (1899) 81 L. T. 83 a frying-fish business, carried on in Cavendish Place, Eastbourne, was held to be offensive.

The business of a licensed victualler (*a*), a butcher (*b*), and a slaughter-house (*c*), are not necessarily offensive. (*a*) *Jones* v. *Thorne*, (1823) 3 D. & R. 152; (*b*) *Cleaver* v. *Bacon*, (1887) 4 Times Rep. 27; (*c*) *Rapley* v. *Smart*, (1893) 10 Times Rep. 174.

It was held in *Hickman* v. *Isaacs*, (1861) 4 L. T. 285, that using premises for depositing large quantities of lucifer matches, whereby they were rendered uninsurable, was not within a covenant not to carry on any offensive business.

A laundry business is not offensive. *Knight* v. *Simmonds*, [1896] 1 Ch. p. 661; [1896] 2 Ch. 294.

It has been held upon the construction of a lease that a lessee who had covenanted not to carry on offensive trades might not do this upon payment of an increased rent which was reserved if any such trade was carried on. *Weston* v. *The Managers of the Metropolitan Asylum District*, (1882) 9 Q. B. D. 404.

If a purchaser covenants not to do anything offensive upon land, a nuisance created by him on adjoining land is not a fraud on the covenant. *Cleeve* v. *Mahaney*, (1861) 9 W. R. 882.

To come within sect. 112 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), a trade, business, or manufacture must be necessarily noxious or offensive. *The Braintree Local Board of Health* v. *Boyton*, (1885) 52 L. T. 99; see also *Withington Local Board*

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of Health v. *Corporation of Manchester*, [1893] 2 Ch. 19.

Noisome and noxious.

As to the meaning of "noisome" and "noxious," see *Earl of Pembroke* v. *Warren*, [1896] 1 Ir. R. p. 131; *R.* v. *White and Ward*, (1757) 1 Burr. 334, 337.

Lime-burning has been held to be a noisome business. *Wiltshire* v. *Cosslett*, (1889) 5 Times Rep. 410.

Dangerous trade.

The sale of an incandescent lamp in which petrol was used was held to be a dangerous trade, which increased the risk of fire. *Teape* v. *Douse*, [1905] 92 L. T. 319.

3. General Words.

Nuisance.

In *Harrison* v. *Good*, (1871) L. R. 11 Eq. 338, Bacon, V.-C., held that the word "nuisance" in a covenant not to do anything which might be deemed a nuisance must be restricted to legal nuisances, and that a national school was not within the covenant. This decision has been questioned. *Tod-Heatly* v. *Benham*, (1888) 40 Ch. D. 95.

Annoyance, grievance or damage.

Effect will be given to the words "annoyance," "grievance," or "damage," when they occur in addition to "nuisance." See *In re Davis* v. *Cavey*, (1888) 40 Ch. D. 606; *Tod-Heatly* v. *Benham*, *supra*.

"Annoyance" or "grievance" are words which have no definite legal meaning. *Per* Cotton, L.J., *Tod-Heatly* v. *Benham*, *supra*, 93.

In *Watson* v. *Leamington College* (referred to 25 Sol. J. 30) six boys in a sanatorium who were affected with infectious diseases were held to be a nuisance or annoyance to the neighbourhood.

In *Tod-Heatly* v. *Benham*, (1888) 40 Ch. D. 80, the covenant prohibited any act to the annoyance, nuisance,

grievance, or damage of the lessor, or the inhabitants of neighbouring houses. The Court of Appeal held the covenant to be broken by annoyance to the inhabitants of neighbouring houses, and restrained the carrying on of a hospital. It is here laid down that in order to prove that a hospital causes annoyance within the meaning of a covenant of this nature, evidence is sufficient which shows that sensible people in the neighbourhood, who are not fanciful and have no expert knowledge, have a reasonable fear of infection which interferes with their ordinary enjoyment of their houses.

In *Wood* v. *Cooper*, [1894] 3 Ch. 671, the lessee covenanted not to do anything which might be "an annoyance, nuisance, or disturbance," to the neighbourhood or to any tenant of the lessors. The lessee erected above his boundary fence an open trellis-work screen which interfered with the access of light to adjoining premises. Romer, J., held that this caused "annoyance" within the meaning of the covenant.

In *Our Boys Clothing Co.* v. *Holborn Viaduct Land Co.*, (1896) 12 Times Rep. 344, Romer, J., held that covenants of this kind must be construed reasonably with regard to the circumstances of the case, and that the exhibition of an advertisement of a sale by lessees of a shop was not within a covenant not to do anything to the "injury, annoyance, disturbance, or inconvenience" of the lessors.

In *The Gresham Life Assurance Co.* v. *Ranger*, (1899) 15 Times Rep. 454, the covenant prohibited "injury, discomfort, or annoyance to the plaintiffs." The defendant kept his shop blinds down to heighten the effect of lamps placed among jewellery in the windows. The Court of Appeal refused to grant an injunction.

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Disagreeable.

In *Wauton* v. *Coppard*, [1899] 1 Ch. 97, Romer, J. considered that a preparatory school for boys would cause a "disagreeable," if not an "injurious or offensive noise or nuisance."

Injurious.

In *Knight* v. *Simmonds*, [1896] 1 Ch. 661; 2 Ch. 294, the word "injurious" was considered to apply to direct injury only. But if the word was to have a larger meaning only such businesses as were injurious from their special nature or from the way in which they were carried on were prohibited. On the evidence it was held that a laundry business did not injure the property of the plaintiff.

Whether general words are confined to matters *ejusdem generis* with the named trades.

If a prohibition against carrying on specified trades is followed by general words, the general words are not necessarily confined to matters *ejusdem generis* with the named trades. *Wanton* v. *Coppard*, [1899] 1 Ch. 92; *Earl of Pembroke* v. *Warren* [1896] 1 Ir. R. 76; *Tod-Heatly* v. *Benham*, (1888) 40 Ch. D. 80; *Power* v. *Barrett*, (1887) 19 L. R. Ir. 450; *cf. Anderson* v. *Anderson*, [1895] 1 Q. B. 749.

In *Wauton* v. *Coppard*, [1899] 1 Ch. 92, the covenant prohibited the business of a melter or boiler of tallow, gasmaker, blacksmith, &c., or any business whereby "any injurious or offensive or disagreeable noise or nuisance" should be caused or made. It was held that a school was within the general words of the covenant.

In *Earl of Pembroke* v. *Warren*, [1896] 1 Ir. R. 76, the covenant prohibited the business of a tavern, alehouse, soap-boiler, chandler, &c., "or any other offensive or noisy trade, business, or profession whatsoever." The Court of Appeal in Ireland held that a private hospital was within the general words of the covenant.

In *Tod-Heatly* v. *Benham*, (1888) 40 Ch. D. 80, the

covenant not to carry on offensive trades was followed by general words prohibiting any act which should be to the annoyance of the inhabitants of neighbouring houses. The Court of Appeal restrained the establishment of a hospital, though the case did not come within the clause dealing with offensive trades.

In *Power* v. *Barrett*, (1887) 19 L. R. Ir. 450, the covenant prohibited "the business of a soap-boiler, brewer, tanner, skinner, lime-burner, blacksmith, or any other dangerous, noxious, or offensive" trade. The Court was of opinion that the covenant extended to any trade of a dangerous, noxious, or offensive character; and that the storing of paraffin by a chandler would probably be held to be a dangerous trade.

But where the trades and businesses enumerated were all conducted by buying and selling, the Court refused to restrain the use of the house for a private lunatic asylum. *Doe* d. *Wetherell* v. *Bird*, (1834) 2 A. & E. 161; 4 L. J. N. S. K. B. 52; 4 N. & M. 285.

Similarly, it has been held that where enumerated fixtures in a lessee's covenant belonged to one genus, viz. landlord's fixtures, general words which followed must be construed as applying only to things of the same genus. *Lambourn* v. *McLellan*, [1903] 2 Ch. 268.

No trades enumerated.

In *Bramwell* v. *Lacy*, (1879) 10 Ch. D. 691, no trades were enumerated. The lessee covenanted not to carry on "any trade, business, or dealing whatsoever, or anything of the nature thereof, . . . or suffer any act or thing which may be or grow to the annoyance, damage, injury, prejudice, or inconvenience, of the neighbouring premises." A throat and chest hospital for poor persons was held to come within both clauses of the covenant.

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4. Covenants Restricting Building on Land.

Buildings not to be erected.

In *Bowes* v. *Law*, (1870) L. R. 9 Eq. 636, the covena prohibited the erection of "buildings except dwellin houses." The Court declared that a boundary wall eig feet high was not a breach of the covenant, but th the raising of the wall at one part to the height eleven feet and the erection against it of a vinery we within the covenant.

A hoarding may or may not, according to the contex be a building. *Per* Buckley, J., *Boyce* v. *Paddingt Borough Council*, [1903] 1 Ch. 116, and cases the cited; approved *Paddington Corporation* v. *A.-G.*, [1906 A. C. 3.

In *Pocock* v. *Gilham*, (1883) 1 Cab. & E. 104, th erection of hoardings for purposes of advertisemen against the side of a dwelling-house and on the top of parapet wall was held to be within a covenant not "t erect or make any other building or erection."

In *Foster* v. *Fraser*, [1893] 3 Ch. 158, a covenan provided that any building erected on the land shoul be of a certain height, and have a stuccoed front an slated roof, and be used only as a dwelling-house. A advertisement hoarding was held not to be within th covenant.

In *Wood* v. *Cooper*, [1894] 3 Ch. 671, the covenant prohibited any other building whatsoever except a stable and coach-house. An open trellis-work screen erected above the boundary fence was held to be a building within the meaning of the covenant.

A railway embankment has been held to be a building. *The Long Eaton Recreation Grounds Co.* v. *Midland Railway*, [1902] 2 K. B. 574.

In *Graham* v. *The Corporation of Newcastle-upon-Tyne*, (1892) 67 L. T. 790, the covenant provided that the centre of a square should "be kept open and unbuilt upon." The Court refused to restrain the erection of an underground building the roof of which projected slightly, if at all, above the surface of the ground.

Additions to house.

In *Domvile* v. *Colville*, (1878) Ir. R. 7 C. L. 68, a covenant not to erect any dwelling-house or other building which should, in the whole or in part, be occupied as a dwelling-house, was held to be broken by the enlargement of an existing dwelling-house.

Building line.

In *Lord Manners* v. *Johnson*, (1875) 1 Ch. D. 673, bay windows projecting three feet and carried from the foundations up to the roof were held to be within a covenant not to erect any building nearer to the road than the line of frontage of houses in the road.

In *Child* v. *Douglas*, (1854) 1 Kay, 560; 5 De G. M. & G. 739, Page-Wood, V.-C., held that a wall fifteen feet high, at right angles to the street, and extending up to it, was a breach of a similar covenant; but that the covenant was not broken by the projection a few inches too far of the lower part of a wall, nor by a brick porch which came forward one foot within the limit. The Court of Appeal held that the plaintiff had not shown a case for an interlocutory injunction.

In *Goolden* v. *Anstee*, (1868) 18 L. T. 898, a purchaser covenanted to build a house "under the inspection and to the satisfaction of the architect" of the vendor. The plaintiff claimed that the house should be in conformity with those on adjoining lots, and that the houses should be in one line. Malins, V.-C., held that the defendant was bound to erect the house and place it to the satisfaction of the architect.

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Height of building.

In *Western* v. *MacDermott*, (1866) L. R. 2 Ch. 72; L. J. Ch. 76, a bow window was held to be within covenant that there should be no building in the garc of a house which should exceed the level of the parl floor.

A purchaser's covenant not to build above a certa height does not amount to a reservation to the vendor the right to use the upper surface of light and air for l own purposes. See *per* Wood, V.-C., *Pinchin* v. *Lond and Blackwall Railway*, (1854) 2 Eq. R. 1172; 2 W. R. 69 affirmed, 24 L. J. Ch. 417.

Private dwelling-houses only.

A railway embankment has been held to be a brea of a covenant not to erect "any building other tha private dwelling-houses." *Long Eaton Recreation Groun Co.* v. *Midland Railway Co.*, [1902] 2 K. B. 574.

A covenant that no buildings shall be erected excep private dwelling-houses does not prevent the erection buildings which are appurtenant to a dwelling-house *e.g.*, stables. See *Blake* v. *Marriage*, (1893) 9 Time Rep. 569; *Russell* v. *Baber*, (1870) 18 W. R. 1021.

But a building not in any way connected with dwelling-house and intended to be used as an art studi was held to infringe a covenant to "erect privat dwelling-houses only." *Patman* v. *Harland*, (1881) 1 Ch. D. 359.

Number of houses to be built.

A building containing flats is one "house" within a covenant not to erect more than a certain number of houses, unless the context alters the popular meaning of the word. *Kimber* v. *Admans*, [1900] 1 Ch. 412.

In *Rogers* v. *Hosegood*, [1900] 2 Ch. 388, a block of residential flats was held to infringe (1) a covenant that no more than one messuage or dwelling-house

should be erected, and that such messuage should be adapted for and used as a private residence only; and (2) a covenant that every messuage to be erected should be adapted for and used as a private residence only.

A building divided into two tenements on different floors, with no internal communication, constitutes two houses. *Ilford Park Estates, Limited* v. *Jacob*, [1903] 2 Ch. 522.

In *Hawes* v. *Scott*, (1896) 40 Sol. J. 373, the Court of Appeal held (A. L. Smith, L.J., dissenting), that a covenant "not to erect more than two dwelling-houses" did not preclude the erection of a wall.

Value of the houses.

If semi-detached houses are thrown together, it is a question of fact whether they are one house within the meaning of a covenant as to value. *Snow* v. *Whitehead*, (1884) 51 L. T. 253.

A covenant as to the value of semi-detached villas is not broken by building one of a pair of villas in the first instance. But, *semble*, the covenantor must build the companion villa within a reasonable time. *Knight* v. *Simmonds*, [1896] 1 Ch. 653; 2 Ch. 294.

Whether a building restriction extends to user.

In *Webb* v. *Fagotti Brothers*, (1899) 79 L. T. 683, the covenant provided that no hotel should "be built." The Court held that the meaning of the covenant was that no hotel should "be" on the land.

A covenant to make an area was held to impose an obligation not to build on the area. *Herbert* v. *Maclean*, (1860) 12 Ir. Ch. R. 84.

But a covenant to build shops does not prevent the covenantor from using the shops when built for other purposes. *Holford* v. *Acton Urban Council*, [1898] 2 Ch. 248; see also *Wright* v. *Berry*, (1903) 19 Times

Chap. IV. Rep. 259; distinguish *Bray* v. *Fogarty*, (1870) Ir. R. 4 Eq. 544.

Alterations. The word "alteration" in a covenant not to make any alteration of premises means *primâ facie* alteration to the form and structure of the building. *Bickmore* v. *Dimmer*, [1903] 1 Ch. 158.

In *Crawley* v. *Wolff*, (1888) 4 Times Rep. 434, a covenant not to make any alteration in the laying out or use of land, either by planting or otherwise which would interfere with a view, was held not to be infringed by permitting trees to grow which were planted at the date of the covenant.

Not to sell for building. A condition not to subdivide in order to sell for building purposes has been held to be broken by advertising the land for sale in plots without actual transfer of the plots. *Short* v. *Turffontein Estates, Limited*, [1905] A. C. 584.

A reservation of a right to sell land "for building sites" has been held to refer to the sale of the land for the erection of dwelling-houses, shops, etc., and not apply to a sale for a smallpox hospital. *English* v. *Tynemouth Corporation*, (1903) 67 J. P. 239.

5. Covenants Restricting the Sale of Intoxicating Liquors.

The sale under a licence of beer by retail to be consumed off the premises is not a breach of a covenant not to use a house as a "public-house" (*a*) or "beer-house" (*b*), but is a breach of a covenant not to use a house as a "beershop" (*c*). (*a*) *Pease* v. *Coats*, (1866) L. R. 2 Eq. 688; (*b*) *London and North Western Railway Co.* v. *Garnett*, (1869) L. R. 9 Eq. 26; *Holt & Co.* v. *Collyer*, (1881) 16 Ch. D. 718; (*c*) *London and Suburban*

Land and Building Co. v. *Field*, (1881) 16 Ch. D. 645; *Bishop of St. Albans* v. *Battersby*, (1878) 3 Q. B. D. 359; *Nicoll* v. *Fenning*, (1881) 19 Ch. D. 258.

In *Duke of Devonshire* v. *Simmons*, (1894) 11 Times Rep. 52, the covenant prohibited user as a public-house or beershop. The house was used as a private hotel, with a full licence to sell wine, beer, and spirits, but on granting the licence an undertaking had been given that no public bar should be erected, and that the licence should only be used for supplying visitors staying at the hotel. Stirling, J., refused an injunction upon the defendant undertaking not to sell beer or other malt liquors, and not to sell intoxicating liquors except to guests and travellers staying in the house.

The supply of liquors to members of a club is not a sale within the meaning of a covenant not to use for the sale of malt and spirituous liquors. *Ranken* v. *Hunt*, (1894) 10 R. 249.

The sale by a grocer of spirits in bottle is within a covenant not to use "for the sale of spirituous liquors." But these words do not prevent the sale of wine. *Feilden* v. *Slater*, (1869) L. R. 7 Eq. 523.

The sale by a grocer of wine and spirits in bottle was held not to infringe a covenant prohibiting the trade of a "seller by retail of wine, beer, or spirituous liquors," which had been entered into at a time when the sale by a grocer of wine and spirits would not have been contemplated. *Jones* v. *Bone*, (1870) L. R. 9 Eq. 674.

The sale of wine by the glass is a breach of a covenant to use premises "for offices and the storage of wine and spirits only." *Randell* v. *Block*, (1893) 38 Sol. J. 141.

The sale of wine, spirits, and beer at the refreshment

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bars of a theatre is within a covenant not to carry on the trade of a retailer of wine, spirits, and beer. *Buckle* v. *Fredericks*, (1890) 44 Ch. D. 244.

The business of a retail brewer is not within a covenant not to carry on the business of a common brewer or retailer of beer. *Simons* v. *Farren*, (1834) 1 Bing. N. C. 126.

It has been held in Ireland that carrying on a spirit grocery is not a breach of a covenant "not to follow the trade or business of a publican.' *In re Cullen and Rial's Contract*, [1904] 1 Ir. R. 206.

A vintner means anyone who sells wine. *Wells* v. *Attenborough*, (1871) 24 L. T. 312.

6. Covenants Tying Public-houses.

The obligation of a covenant to buy beer of a firm of brewers has been held to be conditional upon the performance of an express covenant by the brewers to supply beer of a specified quality and price. *Luker* v. *Dennis*, (1877) 7 Ch. D. 227.

If there is no express provision as to the quality of the beer to be supplied an obligation is implied on the part of the brewers to supply good marketable beer (*a*), and, it seems, to supply the publican with such kinds of beer as he requires (*b*). (*a*) *Luker* v. *Dennis*, *supra*; (*b*) *Edwick* v. *Hawkes*, (1881) 18 Ch. D. 199.

The publican need not deal with the brewer directly, but may buy the beer through an agent. *Edwick* v. *Hawkes*, *supra*.

A covenant to take beer "at the fair current market price" means at a price which is fair and current in the case of tied houses. This is not equivalent to the lowest

price at which a tenant of a free public-house could buy. *Arnold, Perrett & Co.* v. *Radford*, (1901) 17 Times Rep. 301. Chap. IV.

An absolute covenant to buy beer of a landlord, with a provision for reduction of rent so long as it is observed, does not give the tenant the right to deal with a rival brewer upon payment of the unreduced rent. *Hanbury* v. *Cundy*, (1887) 58 L. T. 155.

7. Of the Meaning of Certain Words.

"Permit to be used."

The words shall "not permit or suffer" are not equivalent to shall "hinder or prevent." *Hall* v. *Ewin*, (1887) 37 Ch. D., p. 82.

Thus the act of a sub-lessee in permitting a sale by auction on the premises is not a breach of the lessee's covenant not to permit a sale by auction to be held. *Toleman* v. *Portbury*, (1870) L. R. 5 Q. B. 288.

A lessee cannot be said to have "permitted" the act of a sub-lessee which infringes a restrictive covenant in the lease because he did not insert in the sub-lease covenants as strict as those contained in the lease. *Prothero* v. *Bell*, (1906) 22 Times Rep. 370.

But if a lessee grants an underlease and authorises the use of the land in a manner forbidden by a covenant in the lease he commits a breach of the covenant. *Hall* v. *Ewin*, (1887) 37 Ch. D. 78, 82; *Teape* v. *Douse*, (1905) 92 L. T. 319.

A covenant not to permit a house to be used for a particular purpose does not apply to accidental user. See *per* Jessel, M.R., *Portman* v. *Home Hospital Association*, (1879) 27 Ch. D. 81, n.

"Do or suffer to be done."

Primâ facie the words "do or suffer to be done" involve the doing of an act, or an abstention from action,

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by the covenantor or some person standing in the relation of agent to him, a relation which does not exist between lessor and lessee. *Wilson* v. *Twamley*, [1904] 2 K. B. p. 105.

Adjoining.

The word "adjoining" in a restrictive covenant means in physical contact with. *White* v. *Harrow*; *Harrow* v. *Marylebone District Property Co.*, (1902) 86 L. T. 4; *Ind, Coope & Co.* v. *Hamblin*, (1900) 84 L. T. 168; *Vale and Sons* v. *Moorgate Street, &c., Buildings, Limited*, (1899) 80 L. T. 487; see also *Harrison* v. *Good*, (1871) L. R. 11 Eq. 338.

Where land was sold in lots, and each purchaser covenanted not to do anything which might be a nuisance to occupiers of "adjoining" property, the covenants were held to apply to land adjoining each lot, so as to be enforceable by the purchasers *inter se*. *Harrison* v. *Good*, (1871) L. R. 11 Eq. 338.

Lands situate on opposite sides of a street have been held to be "adjoining or contiguous," the subsoil of the street being presumed to belong to the owners of the land adjoining the street. *Haynes* v. *King*, [1893] 3 Ch. 439.

But it has been questioned whether this presumption applies to houses in a town or where land is sold in plots for building purposes. *Leigh* v. *Jack*, (1879) 5 Ex. D. p. 274; *Mappin Brothers* v. *Liberty & Co., Limited*, [1903] 1 Ch. p. 127.

It has been held that a lessor's covenant not to let adjoining shops for a particular business applied only to shops belonging to the lessor at the date of the covenant. *Buckell* v. *King*, (1895) 40 Sol. J. 50.

Opposite.

In *Patching* v. *Dubbins*, (1853) 23 L. J. Ch. 45, a covenant not to build on land opposite to the plot of

land conveyed was held to apply only to land which was opposite and of the same width as the plot conveyed.

Consent.

In *Everett* v. *Remington*, [1892] 3 Ch. 148, a covenant restricted building without the consent of the vendor, his heirs or assigns. It was held that the consent required was that of the owner of the estate in its popular sense, and not of all lessees and purchasers acquiring title after the date of the conveyance to the defendant.

A switchback railway has been held to be "operative machinery" and a "chattel" within the meaning of a restrictive covenant. *Chamberlayne* v. *Collins*, (1894) 70 L. T. 217.

CHAPTER V.

THE REMEDY BY INJUNCTION FOR BREACH OF A COVENANT.

1. When an Injunction will be granted.

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The discretion of the Court.

Courts of Equity have drawn a distinction between affirmative and negative covenants in granting injunctions to restrain that which would be a breach of covenant. It is laid down by Lord Cairns in *Doherty* v. *Allman*, (1878) 3 App. Cas. 719, that if the covenant is negative the Court has no discretion to exercise. If parties for valuable consideration, with their eyes open, contract that a thing shall not be done, all that a Court of Equity has to do is to say by way of injunction that which the parties have already said by way of covenant. It is not a question of the balance of convenience or inconvenience, or of the amount of damage or injury; it is the specific performance by the Court of the negative bargain which the parties have made.

If the covenant is affirmative the Court may interpose to prevent that being done which would be a departure from the covenant. But the Court will consider whether the injury which it is asked to restrain, if done, cannot be remedied; whether it would be sufficiently atoned for by payment of damages; whether the damages could be recovered in one action; and whether interfering by injunction would cause possible damage to the defendant greater than any possible advantage to

the plaintiff. *Doherty* v. *Allman, supra;* see also *Osborne* v. *Bradley,* [1903] 2 Ch. 450.

The breach of a restrictive covenant is sufficient ground for the Court to interfere by injunction without the covenantee showing damage. *Lord Manners* v. *Johnson,* (1875) 1 Ch. D. 673; *Richards* v. *Revitt,* (1877) 7 Ch. D. 224; *per* Cotton, L.J., *Tod-Heatly* v. *Benham,* (1888) 40 Ch. D. 91; *Cooke* v. *Gilbert,* (1892) 8 Times Rep. 382.

This rule applies when the defendant is an assignee of the land with notice of the covenant. *Richards* v. *Revitt, supra.*

But a person entitled in remainder must show that he has sustained some material damage to entitle him to relief. *Johnstone* v. *Hall,* (1856) 2 K. & J. 414; 25 L. J. Ch. 462.

The Court will grant an injunction if the defendant threatens to commit a clear breach of a negative covenant. See *McEacharn* v. *Colton,* [1902] A. C. 104; *cf. Shafto* v. *Bolckow, &c., Co.,* (1887) 34 Ch. D. 725.

The circumstance that works undertaken in breach of a covenant are of great public importance will not induce the Court to refuse an injunction. *Lloyd* v. *London, Chatham, and Dover Railway Co.,* (1865) 34 L. J. Ch. 401.

The Court will restrain the breach of a covenant for quiet enjoyment in a proper case. *Allport* v. *Securities Co.,* (1895) 72 L. T. 533; *Shaw* v. *Stenton,* (1858) 2 H. & N. 858; see also *Leader* v. *Moody,* (1875) L. R. 20 Eq. 145.

In *Allport* v. *Securities Co., supra,* a mandatory injunction was granted.

When a lessor contracted with the lessee of a stall that he should have the exclusive right to sell certain classes of goods, the lessor was restrained from permitting

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the sale of such goods by other stall-holders. *Altman* v. *Royal Aquarium Society*, (1876) 3 Ch. D. 228.

Interlocutory injunction.

If the covenant is clear, and the breach clear, and irreparable injury is likely to occur from it, the Court will interfere by injunction before the hearing. But if the covenant is not clear, or it is doubtful whether a breach has been committed, or no irreparable injury is likely to be occasioned, it becomes a question whether the injury occasioned to the defendant by granting the injunction will be greater than that occasioned to the plaintiff by refusing it. *Wilkinson* v. *Rogers*, (1864) 12 W. R. 284; *cf. Corporation of Cork* v. *Rooney*, (1881) 7 L. R. Ir. 191.

Whether the covenant is negative.

Where an affirmative covenant has a negative element in it, or where a covenant is partly affirmative and partly negative, the negative part can be properly enforced. *Clegg* v. *Hands*, (1890) 44 Ch. D. 508, 522; see also Fry's Specific Performance (4th ed.), 867.

A covenant, though affirmative in terms, may be negative in substance (*a*); and a covenant negative in terms may be affirmative in substance (*b*). (*a*) *Catt* v. *Tourle*, (1869) L. R. 4 Ch. 654; *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1901] 2 Ch. 37; *Metropolitan Electric Supply Co.* v. *Ginder*, [1901] 2 Ch. 799; (*b*) *Davis* v. *Foreman*, [1894] 3 Ch. 654.

It seems that a covenant by an assignee of a lease to observe negative covenants in the lease is not a negative covenant within the rule which binds the Court to grant an injunction where a negative covenant has clearly been broken. *Harris* v. *Boots Cash Chemists (Southern), Limited*, [1904] 2 Ch. 376.

Proviso for payment of a penalty.

If a negative covenant is absolute the Court will enforce it by injunction though there is a proviso for

the payment of a penalty upon breach. *French* v. *Macale*, (1842) 2 Dr. & War. 269; *Cole* v. *Sims*, (1854) 23 L. J. Ch. 258; *Clark* v. *Watkins*, (1863) 1 N. R. 227; *Fox* v. *Scard*, (1863) 33 Beav. 327; *Bray* v. *Fogarty*, (1870) Ir. R. 4 Eq. 544; *Jones* v. *Heavens*, (1877) 4 Ch. D. 636; *London and Yorkshire Bank* v. *Pritt*, (1887) 56 L. J. Ch. 987; *Hanbury* v. *Cundy*, (1887) 58 L. T. 155; *National Provincial Bank of England* v. *Marshall*, (1888) 40 Ch. D. 112.

But if the true meaning of the contract is that the defendant shall be at liberty to infringe the covenant upon the payment of a specified sum, the Court will not restrain him from doing so. *French* v. *Macale*, (1842) 2 Dr. & War. p. 276; *Gerrard* v. *O'Reilly*, (1843) 3 Dr. & War. 414; *Ranger* v. *Great Western Railway Co.*, (1854) 5 H. L. Cas. 72, 94.

The Court refused to grant an injunction where the plaintiff had recovered the sum named. *Sainter* v. *Ferguson*, (1849) 1 Mac. & G. 286; *Carnes* v. *Nesbitt*, (1862) 7 H. & N. 778; *Young* v. *Chalkley*, (1867) 16 L. T. 286.

As to whether a sum made payable by way of compensation for breach of a contract is to be treated as liquidated damages or as a penalty, see *Pye* v. *British Automobile Commercial Syndicate*, [1906] 1 K. B. 425.

Mandatory injunction.

There is no rule which prevents the Court from granting an injunction to compel the removal of buildings which have been completed before the issue of the writ. *Durell* v. *Pritchard*, (1865) L. R. 1 Ch. 244; *City of London Brewery Co.* v. *Tennant*, (1873) L. R. 9 Ch. 212, 219; *Lawrence* v. *Horton*, (1890) 62 L. T. 749, 38 W. R. 555; *Shiel* v. *Godfrey & Co.*, (1893) W. N. 115.

Injunctions have been granted though the building

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was complete in cases where the building was easily removable (*a*); where the plaintiff had complained before the completion of the building, and the defendant had hurried on the building to anticipate the order of the Court (*b*); and where the plaintiff had not been aware of the breach of covenant (*c*). (*a*) *Baxter* v. *Bower*, (1875) 44 L. J. Ch. 625; (*b*) *Chitty* v. *Bray*, (1883) 48 L. T. 860; (*c*) *London, Chatham, and Dover Railway* v. *Bull*, (1882) 47 L. T. 413.

But the Court will rarely interfere to pull down a building which has been erected without complaint. *Per* Thesiger, L.J., *Gaskin* v. *Balls*, (1879) 13 Ch. D. 329.

A mandatory injunction will be granted when there has been a deliberate breach of a covenant not to alter premises, after notice of objection, if the plaintiff is not barred by laches. *Bickmore* v. *Dimmer*, [1903] 1 Ch. 158.

A mandatory injunction may be granted without the covenantee showing that he has sustained damage. *Lord Manners* v. *Johnson*, (1875) 1 Ch. D. 673; see also *Western* v. *Macdermot*, (1865) L. R. 1 Eq. 499; *Wood* v. *Cooper*, [1894] 3 Ch. 671.

But an injunction was refused in *Bowes* v. *Law*, (1870) L. R. 9 Eq. 636; *Kilbey* v. *Haviland*, (1871) 19 W. R. 698.

A mandatory injunction should not restrain the defendant from allowing buildings to remain, but order their removal. *Jackson* v. *Normanby Brick Co.*, [1899] 1 Ch. 438.

As to costs where a mandatory injunction was claimed in respect of alteration of demised premises, and the defendant reinstated the premises after issue

of the writ, see *Doherty* v. *Thompson*, (1906) 94 L. T. 626.

On interlocutory application.

Mandatory injunctions have been granted on interlocutory application in cases where the defendant had endeavoured to anticipate the order of the Court by hurrying on the building (*a*), or had endeavoured to evade service of the writ (*b*), or had applied for leave to infringe the covenant and, on leave to do so being refused, had broken the covenant (*c*), and when no substantial question remained to be tried (*d*). (*a*) *Daniel* v. *Ferguson*, [1891] 2 Ch. 27; (*b*) *Von Joel* v. *Hornsey*, [1895] 2 Ch. 774; (*c*) *Morris* v. *Grant*, (1875) 24 W. R. 55; (*d*) *Allport* v. *Securities Co.*, (1895) 72 L. T. 533.

2. Loss of the Right to Enforce the Covenant.

Acquiescence and laches.

When a Court of Equity is asked to enforce a covenant by granting an injunction, equitable as distinguished from legal defences have to be considered. The conduct of the plaintiff may disentitle him to relief; his acquiescence in what he complains of or his delay in seeking relief may of itself be sufficient to preclude him from obtaining it. *Knight* v. *Simmonds*, [1896] 2 Ch. 297; see also *per* Lord Blackburn, *Erlanger* v. *New Sombrero Phosphate Co.*, (1878) 3 App. Cas. 1279.

Acquiescence means more than simple laches. "If a party, who could object, lies by and knowingly permits another to incur an expense in doing an act under the belief that it would not be objected to, and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce; but the fact of simply neglecting to enforce a claim for the period during which the law permits him to delay, without

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losing his right," is not an equitable bar. See *per* Lord Wensleydale, *Archbold* v. *Scully*, (1861) 9 H. L. Cas. 388; *per* Lord Cottenham, *Duke of Leeds* v. *Amherst*, (1846) 2 Ph. 123.

If the defendant has changed his position through his own mistake, the Court will not withhold equitable relief. *Duke of Northumberland* v. *Bowman*, (1887) 56 L. T. 778.

The circumstance of looking on is in many cases as strong as using terms of encouragement. *Per* Lord Eldon, *Dann* v. *Spurrier*, (1802) 7 Ves. 235.

Where the plaintiffs had stood by knowing that houses were being built for the purpose of being let as butchers' shops, they were held to have lost their right to enforce a covenant that on the grant of any lease of the land a restriction should be imposed against the user of the premises for the sale of meat or poultry. *The Mayor, &c., of London* v. *Sandon*, (1872) 26 L. T. 86.

But a party who stands by through being ignorant that he possesses a right is not barred from obtaining equitable relief. *Earl of Beauchamp* v. *Winn*, (1873) L. R. 6 H. L. 223.

The term "acquiescence" has a different signification according to whether the acquiescence alleged occurs while the act acquiesced in is in progress or only after it has been completed. The term in its proper sense applies while the act acquiesced in is in progress. When once an act is completed without any knowledge or assent of the party injured his right of action is not ordinarily barred by mere submission to the injury for any time short of the period limited by statute for the enforcement of the right of action. Some conduct amounting to release or accord and satisfaction must be

shown, although, on account of laches, relief may be refused under special circumstances. *De Bussche* v. *Alt*, (1878) 8 Ch. D. 286, 314.

A continual claim unaccompanied by any act to give effect to it will not keep a right alive which would otherwise be barred by laches. *Lehmann* v. *McArthur*, (1868) L. R. 3 Ch. 496, 504.

If the plaintiff stands by while a breach of a restrictive covenant is in progress, the question is whether he has debarred himself from obtaining equitable relief by delay or acquiescence. See *Knight* v. *Simmonds*, [1896] 2 Ch. 294; *Sayers* v. *Collyer*, (1884) 28 Ch. D. 103.

It is material to consider whether the plaintiff has a right to sue at law or merely in equity. For something less than such acquiescence as would be a bar to all relief at law would enable a Court of Equity to give damages instead of an injunction. See *Osborne* v. *Bradley*, [1903] 2 Ch. p. 452; *Sayers* v. *Collyer*, (1884) 28 Ch. D. 103; *Eastwood* v. *Lever*, (1863) 33 L. J. Ch. 355.

To deprive a man of his legal rights, acquiescence must amount to fraud. See *per* Fry, L.J., *Willmott* v. *Barber*, (1880) 15 Ch. D. 105; *Russell* v. *Watts*, (1883) 25 Ch. D. 585; followed, *Civil Service Musical Instrument Association* v. *Whiteman*, (1899) 80 L. T. 685, 687.

The defence of acquiescence succeeded in *Eastwood* v. *Lever*, (1863) 33 L. J. Ch. 355; *The Mayor of London* v. *Sandon*, (1872) 26 L. T. 86; *Gaskin* v. *Balls*, (1879) 13 Ch. D. 324; *Kelsey* v. *Dodd*, (1881) 52 L. J. Ch. 34, 37; *Sayers* v. *Collyer*, (1884) 28 Ch. D. 103. The defence failed in *Mitchell* v. *Steward*, (1866) L. R. 1 Eq. 541; *Bray* v. *Fogarty*, (1870) Ir. R. 4 Eq. 544; *Duke of Northumberland* v. *Bowman*, (1887) 56 L. T. 773.

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To justify the Court in refusing to interfere at the hearing of the action, a much stronger case of acquiescence must be shown than is required upon an interlocutory application. *Johnson* v. *Wyatt*, (1863) 2 De G. J. & S. 18; *Patching* v. *Dubbins*, (1853) 1 Kay, 1; *Child* v. *Douglas*, (1854) 5 De G. M. & G. 739.

A plaintiff is not barred by acquiescence when the damage which he has sustained is not properly attributable to the act which he acquiesced in. See *Bankart* v. *Houghton*, (1859) 27 Beav. 425.

A plaintiff is not precluded from obtaining an injunction to restrain an important breach of covenant by not having interfered to prevent a small and unimportant breach. *Richards* v. *Revitt*, (1877) 7 Ch. D. 224; followed, *Meredith* v. *Wilson*, (1893) 69 L. T. 336; *Osborne* v. *Bradley*, [1903] 2 Ch. 446, 457.

Moreover, the Court will not refuse to restrain a material breach of a restrictive covenant because the covenantee has relaxed the covenant in respect of some part of the property where its observance is unimportant. See *Bray* v. *Fogarty*, (1870) Ir. R. 4 Eq. 544; *Osborne* v. *Bradley*, [1903] 2 Ch. p. 457.

But a landlord cannot enforce restrictive covenants against some of his tenants if he has rendered their object unattainable by relaxing them in favour of other tenants. See *Roper* v. *Williams*, (1822) Turn. & R. 18; considered, *Peek* v. *Matthews*, (1867) L. R. 3 Eq. 517; *German* v. *Chapman*, (1877) 7 Ch. D. 278.

Waiver and abandonment.

Long-continued acquiescence in breaches of a restrictive covenant by the defendant and similar covenantors will amount to a waiver or abandonment of the covenant. See *Kelsey* v. *Dodd*, (1881) 52 L. J. Ch. 34, 38; distinguished, *Maunsell* v. *Hort*, (1877) 1 L. R. Ir. 88, 95.

When all the purchasers of an estate are bound by restrictive covenants a vendor by giving permission to one purchaser to infringe the covenant does not waive the covenant as to another purchaser whose house is at some distance. *Kemp* v. *Sober*, (1851) 1 Sim. N. S. 517; *German* v. *Chapman*, (1877) 7 Ch. D. 271; *Knight* v. *Simmonds*, [1896] 2 Ch. 294, 298.

Similarly, a passive acquiescence in a breach of covenant is not a waiver for all future time of the right to complain of any other breach. *Western* v. *Macdermott*, (1866) L. R. 2 Ch. 72, 74; *Kilbey* v. *Haviland*, (1871) 24 L. T. 353; *per* Turner, L.J., *Lloyd* v. *The London, Chatham and Dover Railway Co.*, (1865) 34 L. J. Ch. 405.

Release of the covenant presumed.

The Court will presume that a restrictive covenant has been waived or released when the property has been used for many years in a manner inconsistent with the continuance of the covenant. *Hepworth* v. *Pickles*, [1900] 1 Ch. 108.

Similarly, when a lessor had received rent for upwards of twenty years with knowledge of a breach of a restrictive covenant contained in the lease, a licence to infringe the covenant was presumed to have been granted. *Gibson* v. *Doeg*, (1857) 2 H. & N. 615; *In re Summerson; Downie* v. *Summerson*, [1900] 1 Ch. 112, n.; see also *Tennent* v. *Neil*, (1870) 5 Ir. R. C. L. 418; *Gibbon* v. *Payne*, (1905) 22 Times Rep. 54.

But if actual knowledge of the breach is negatived by the evidence the Court will not presume a licence. *Ashcombe* v. *Mitchell*, (1895) 12 Times Rep. 17.

Breach of covenant by the plaintiff.

A plaintiff is not precluded from enforcing a restrictive covenant by a trivial breach of the covenant committed on his own land. *Western* v. *Macdermott*, (1866) L. R. 2 Ch. 72; *Hooper* v. *Bromet*, (1903) 89 L. T. 37, (1904)

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90 L. T. 284; distinguished, *Goddard* v. *Midland Railway Co.*, (1891) 8 Times Rep. 126.

The spirit, if not the words, of Lord Chelmsford, in *Western* v. *Macdermott*, is to the effect that a man who has been guilty of a trivial breach of covenant, upon putting himself right and not insisting that he is entitled to continue it, may come into Court. *Meredith* v. *Wilson*, (1893) 69 L. T. p. 338.

If covenants are essentially different, a plaintiff who has broken a less important covenant is not precluded from enforcing a more important covenant which he has substantially observed. *Chitty* v. *Bray*, (1883) 48 L. T. 860.

The right to damages may remain though the breach is a good reason for refusing an injunction. *Goddard* v. *Midland Railway Co.*, *supra*.

It seems that a sub-purchaser of part of a lot can enforce the stipulations of a building scheme although his vendor had committed a breach on another part. *Rowell* v. *Satchell*, [1903] 2 Ch. 212.

Alteration in the character of an estate.

A Court of Equity will not enforce a restrictive covenant by injunction if the plaintiff or his predecessors in title have so altered the character of the neighbourhood that the object of the covenant can no longer be attained, and it is manifestly unjust for the Court to enforce it. *Duke of Bedford* v. *The Trustees of the British Museum*, (1822) 2 Myl. & K. 552; *German* v. *Chapman*, (1877) 7 Ch. D. 279; *Knight* v. *Simmonds*, [1896] 2 Ch. 294.

If a reasonable man upon inspecting the property finds that it is in such a state that the covenants are at an end, they are no longer to be enforced. *Meredith* v. *Wilson*, (1893) 69 L. T. 337.

There is no rule that if a restrictive covenant for the preservation of a building estate is not enforced in all cases it cannot be enforced in any. *Knight* v. *Simmonds*, [1896] 2 Ch. p. 298; *German* v. *Chapman*, (1877) 7 Ch. D. p. 278.

If the object for which restrictions were imposed is still attainable an injunction will not be refused because in a few instances the covenants have not been enforced. *Kemp* v. *Sober*, (1851) 1 Sim. N. S. 517; *Western* v. *Macdermott*, (1866) L. R. 2 Ch. 72; *Kilbey* v. *Haviland*, (1871) 24 L. T. 353; *German* v. *Chapman*, (1877) 7 Ch. D. 271; *Jackson* v. *Winnifrith*, (1882) 47 L. T. 243; *Mayor of Plymouth* v. *Martin*, (1884) 1 Times Rep. 5; *The Merchant Venturers of Bristol* v. *Bridges*, (1886) 2 Times Rep. 726; *Meredith* v. *Wilson*, (1893) 69 L. T. 336; *Knight* v. *Simmonds*, [1896] 2 Ch. 294.

But a vendor cannot enforce building restrictions if he has permitted such material breaches of the covenants that the building scheme has not been preserved, though the breaches were committed before the defendant became a purchaser and executed the deed of covenant. *Peek* v. *Matthews*, (1867) L. R. 3 Eq. 515.

Similarly, if the covenants were imposed for the protection of the covenantee's property the Court will not enforce them if the plaintiff or his predecessors in title have made it inequitable to do so. *Duke of Bedford* v. *The Trustees of the British Museum*, (1822) 2 Myl. & K. 552; explained, *Osborne* v. *Bradley*, [1903] 2 Ch. 452.

Alteration in the character of the neighbourhood is not a good defence to proceedings for an injunction unless—

(1) The alteration is caused by the acts or omissions

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of the plaintiff or those through whom he claims. *Sayers* v. *Collyer*, (1884) 28 Ch. D. 103; *Craig* v. *Greer*, [1899] 1 Ir. R. 258; and—

(2) Either the covenant was entered into with the object of protecting other property of the covenantee. *Osborne* v. *Bradley*, [1903] 2 Ch. p. 452; *Duke of Bedford* v. *Trustees of the British Museum*, (1822) 2 Myl. & K. 552.

(3) Or for securing the common advantage of a number of purchasers. *Osborne* v. *Bradley*, *supra*; *Sayers* v. *Collyer*, *supra*.

If the covenant was entered into simply for the covenantee's own benefit, in the absence of proof that it was for the protection of his property, change in the character of the neighbourhood, though caused by the plaintiff's own acts, does not disentitle him to an injunction. *Osborne* v. *Bradley*, *supra*.

CHAPTER VI.

RESTRICTIVE COVENANTS AS AFFECTING VENDORS AND PURCHASERS OF LAND.

1. Contracts for the Sale of Land.

Restrictive covenants must be disclosed.

A vendor of land which is subject to a restrictive covenant should disclose the existence of the covenant in his contract or particulars of sale. For a covenant restricting the use and enjoyment of land is a fatal defect of title. *Phillips* v. *Caldcleugh*, (1868) L. R. 4 Q. B. 159; *In re Higgins & Hitchman's Contract*, (1882) 21 Ch. D. 95; *In re Davis & Cavey*, (1888) 40 Ch. D. 601; *In re Ebsworth & Tidy's Contract*, (1889) 42 Ch. D. 23; *In re Cox & Neve's Contract*, [1891] 2 Ch. 109.

In the case of leasehold property, *primâ facie* the contract is for the sale of a lease containing only usual covenants; and if there are unusual covenants, the vendor must give information to the purchaser of the fact. He may discharge this duty by telling the purchaser of the existence of the covenants, or by showing that he knew of them, or that such means of knowledge had been afforded to him that he may be inferred to have known of their existence. *Molyneux* v. *Hawtrey*, [1903] 2 K. B. 487, 491; see also *In re Haedicke & Lipski's Contract*, [1901] 2 Ch. 666; *In re White & Smith's Contract*, [1896] 1 Ch. 637; *Reeve* v. *Berridge*, (1888) 20 Q. B. D. 523.

This obligation is not excluded by a general condition

in the contract providing that the vendor's title is accepted by the purchaser. *In re Haedicke & Lipski's Contract, supra.*

Similarly, when property was put up for sale as "business premises," and the lease contained a covenant restricting its user for business purposes, the Court refused to force the title on a purchaser, though the conditions of sale provided that no objection should be made in respect of anything contained in the lease. *In re Davis & Cavey*, (1888) 40 Ch. D. 601; *cf. Dougherty* v. *Oates*, (1900) 45 Sol. J. 119.

Similarly, if the contract is for an underlease, the lessee must disclose the existence of onerous covenants in the lease. *Hyde* v. *Warden*, (1877) 3 Ex. D. 72; see also *Reeve* v. *Berridge*, (1888) 20 Q. B. D. 527.

The Court refused to rescind a contract where land was sold subject to stipulations contained or referred to in a deed, and inspection of that deed would have shown that the land was subject to restrictions contained in another deed. *In re Childe & Hodgson's Contract*, (1906) 54 W. R. 234.

If the vendor states the contents of a deed in particulars of sale, the purchaser is not bound to examine it. *Cox* v. *Coventon*, (1862) 31 Beav. 378.

A purchaser who has contracted to take a short title is not precluded by sect. 3, sub-sect. 3, of the Conveyancing Act, 1881, from repudiating the contract if he discovers before completion that the property is subject to covenants contained in a deed prior to the root of title. *Nottingham, &c., Co.* v. *Butler*, (1886) 16 Q. B. D. 778.

An intending lessee or assignee of a lease is not precluded by sect. 2 of the Vendor and Purchaser Act, 1874, from showing *aliunde* that the property is

subject to restrictions. *Jones* v. *Watts*, (1890) 43 Ch. D. 574.

The purchaser's knowledge of the existence of the covenant.

If the contract is silent as to the title which is to be shown, evidence may be given to prove that the purchaser had notice of restrictions before the contract was signed. And if this is proved, the purchaser takes subject to the covenant. *In re Gloag & Miller's Contract*, (1883) 23 Ch. D. 320.

But it must appear that the purchaser knew that a good title could not be made when he contracted. It is not sufficient to show that he had notice of restrictions which he believed had been extinguished. *Ellis* v. *Rogers*, (1884) 29 Ch. D. 661.

When the contract expressly provides that a good title shall be made, a purchaser may object to the title on the ground that the land is subject to restrictive covenants, though he had notice of this before contracting. *In re Gloag & Miller's Contract*, (1883) 23 Ch. D. 320.

In that case evidence of the purchaser's knowledge of the existence of the covenants is not admissible. *Cato* v. *Thompson*, (1882) 9 Q. B. D. 616.

Similarly, if land is sold subject to a restrictive covenant, the purchaser need not take a conveyance subject to other restrictions though he had notice of them. *In re Wallis & Barnard's Contract*, [1899] 2 Ch. 515.

Conveyancing Act, 1881, s. 3, sub-s.

Under sect. 3, sub-sect. 4, of the Conveyancing Act, 1881, the production by a vendor of leaseholds of the last receipt for the rent is not conclusive evidence that the covenants of the lease have been performed and observed. *In re Highett & Bird's Contract*, [1903] 1 Ch. 287; explained,

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In re Allen & Driscoll's Contract, [1904] 2 Ch. 226, 231.

2. Specific Performance.

Land subject to restrictions.

The Court will not decree specific performance of a contract against a purchaser if the freedom of the land from a restrictive covenant depends upon the vendor having acquired the land without notice of the covenant. *Nottingham Patent, &c., Co.* v. *Butler*, (1886) 16 Q. B. D. p. 787; *In re Handman & Wilcox's Contract*, [1902] 1 Ch. 599.

When the contract is silent as to compensation for defects of title, the Court will not specifically enforce a contract against a vendor (*a*) or purchaser (*b*) with compensation on the ground of undisclosed restrictive covenants. This relief is inapplicable, compensation for restrictive covenants being difficult to assess (*a*). (*a*) *Rudd* v. *Lascelles*, [1900] 1 Ch. 815; (*b*) *ib.* 819; *Cato* v. *Thompson*, (1882) 9 Q. B. D. 616, 618.

Misdescription

A material misdescription of restrictions affecting the property sold may entitle a purchaser to rescind the contract. *Flight* v. *Booth*, (1834) 1 Bing. N. C. 370.

In such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. *Flight* v. *Booth*, (1834) 1 Bing. N. C. 377; *In re Puckett & Smith's Contract*, [1902] 2 Ch. 264; *In re Contract between Fawcett & Holmes*, (1889) 42 Ch. D. 150; *Jones* v. *Edney*, (1812) 3 Camp. 285.

Contract induced by misrepresentation.

Similarly, if the contract was induced by a material misrepresentation made by the vendor as to restrictions affecting the property, the purchaser is entitled to rescission, though the representation was not made fraudulently. *Wauton* v. *Coppard*, [1899] 1 Ch. 92.

It has been laid down that if a purchaser states the object which he has in purchasing, and the seller is silent as to a covenant prohibiting that object, his silence is equivalent to a representation that there is no prohibitory covenant, although he is not aware of the extent or operation of the covenant. *Power* v. *Barrett*, (1887) 19 L. R. Ir. 450, 457; *Flight* v. *Barton*, (1832) 3 Myl. & K. 282; see also *Van* v. *Corpe*, (1834) 3 Myl. & K. 269.

A purchaser by giving time to the vendor to cure the defect does not lose his right to rely on the misrepresentation as a ground for determining the contract. *Tibbatts* v. *Boulter*, (1895) 73 L. T. 534.

Mistake.

A mistake as to restrictions induced or contributed to by the plaintiff may be a good defence to an action for specific performance. *Baskcomb* v. *Beckwith*, (1869) L. R. 8 Eq. 100; *cf. Denny* v. *Hancock*, (1870) L. R. 6 Ch. 1; *Bray* v. *Briggs*, (1872) 20 W. R. 962; *Brewer* v. *Brown*, (1884) 28 Ch. D. 309.

Parol evidence.

A defendant to an action for specific performance may adduce parol evidence to show that a restriction agreed to by the parties has been omitted from the written contract by mistake. *Barnard* v. *Cave*, (1858) 26 Beav. 253.

But if a contract for the sale of land has been correctly reduced into writing, the Statute of Frauds is a bar to evidence being given of a subsequent parol variation. *Snelling* v. *Thomas*, (1874) L. R. 17 Eq. 303; distinguish *Donald* v. *Scott*, (1860) 10 Ir. Ch. R. 496; *Olley* v. *Fisher*, (1886) 34 Ch. D. 367.

3. Damages.

As to the damages recoverable under an agreement to indemnify a purchaser in respect of building restrictions

when the deed of covenant had been lost, see *Hooper* v. *Bromet*, (1904) 90 L. T. 287.

4. Form of the Conveyance.

If there are restrictive covenants to which the vendor is liable a covenant of indemnity by the purchaser, to which the vendor is entitled, must be put in the conveyance. *Re Cooper & Crondace's Contract*, (1904) 90 L. T. p. 258.

After the conveyance is executed the Court cannot look at the contract for the purpose of modifying the conveyance. *Leggott* v. *Barrett*, (1880) 15 Ch. D. at p. 309; *Teebay* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, (1883) 24 Ch. D. 572; *Williams* v. *Morgan*, (1850) 15 Q. B. 782; *Doe* d. *Norton* v. *Webster*, (1840) 12 A. & E. 442.

If land is sold subject to restrictive covenants which the vendor has covenanted to observe, the purchaser must covenant with the vendor to observe the restrictions; but the covenant should be prefaced with words showing that its only object is to afford the vendor a sufficient indemnity in respect of the restrictive covenants. *In re Poole & Clarke's Contract*, [1904] 2 Ch. 173; *Moxhay* v. *Inderwick*, (1847) 1 De G. & S. 708.

The vendor is entitled to a covenant which will bind the purchaser after he has assigned the property. *Pollock* v. *Rabbits*, (1882) 21 Ch. D. 466.

If the restriction is not disclosed in the contract, a purchaser electing to complete must covenant with the vendor to observe it. *Lukey* v. *Higgs*, (1855) 1 Jur. N. S. 200.

But a vendor cannot compel a purchaser to take a conveyance expressed to be subject to restrictions which

he has not covenanted to observe, and which are not referred to in the contract. *In re Monckton & Gilzean*, (1884) 27 Ch. D. 555; *Hardman* v. *Child*, (1885) 28 Ch. D. 712.

If conditions of sale provide that purchasers shall enter into restrictive covenants with the vendor and with each other, a purchaser must covenant with the vendor though he does not obtain the benefit of covenants by other purchasers, the other lots being unsold. *Re Mordy & Cowman*, (1884) 51 L. T. 721.

5. Provisions of the Settled Land Acts.

By the Settled Land Act, 1882, sect. 4 (6):—"On a sale, exchange, or partition any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, or with respect to or for the purpose of the more beneficial working thereof, or with respect to any other thing, may be imposed or reserved and made binding, as far as the law permits, by covenant, condition, or otherwise, on the tenant for life and the settled land, or any part thereof, or on the other party and any land sold or given in exchange or on partition to him."

6. Provisions of the Land Transfer Acts.

By the Land Transfer Act, 1875, sect. 84:—"Where any land is about to be registered, or any registered land is about to be transferred to a purchaser for valuable consideration, there may be registered as annexed thereto, subject to general rules in the prescribed manner, a condition that such land or any

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specified portion thereof is not to be built on, or is to be or not to be used in a particular manner, or any other condition running with or capable of being legally annexed to land, and the first proprietor and every transferee, and every other person deriving title from him, shall be deemed to be affected with notice of such condition; nevertheless, any such condition may be modified or discharged by order of the Court, on proof to the satisfaction of the Court that such modification will be beneficial to the persons principally interested in the enforcement of such condition."

By Schedule I. to the Land Transfer Act, 1897, "conditions may be annexed to land at any time, and the section shall apply to any restrictive condition capable of affecting assigns by way of notice." See also Land Transfer Rules, 1903, rule 223.

It seems that a purchaser of land registered with an absolute title is not affected by notice of a restrictive covenant if no condition is registered under this section.

A registered disposition of land takes effect by virtue of an overriding power, and not of any estate in the registered proprietor. *Capital and Counties Bank* v. *Rhodes*, [1903] 1 Ch. 631.

The consent of the parties interested is sufficient proof within sect. 84 that modifications will be beneficial to them. *Ground Rent Development Co., Limited* v. *West*, [1902] 1 Ch. 674.

As to who are "persons principally interested" in the enforcement of conditions, see *ib.*

Under rule 3 of the Land Transfer Rules, 1903, notes may be entered in the Property Register relating to conditions and covenants for the benefit of the land.

CHAPTER VII.

OF MEANS BY WHICH A COVENANT MAY BE DISCHARGED.

1. Impossibility of Performance.

The rule in *Paradine* v. *Jane*.

According to the rule in *Paradine* v. *Jane*, (1647) Aleyn, 26, if a man imposes a duty upon himself by his contract, an accident will not excuse him from performing it, for he might have provided against the accident by his contract. But if the law imposes a duty, and the party is disabled from performing it without any default in him, then the law will excuse him. Therefore a lessee is not released from his covenant to pay rent (*a*) or repair (*b*) if the demised premises are destroyed by fire. (*a*) *Monk* v. *Cooper*, (1727) 2 Stra. 763; 2 Lord Raym. 1477; *Belfour* v. *Weston*, (1786) 1 Term Rep. 310; *Hare* v. *Groves*, (1796) 3 Anst. 687; *Leeds* v. *Cheetham*, (1827) 1 Sim. 146; *Lofft* v. *Dennis*, (1859) 1 El. & El. 474; (*b*) *Paradine* v. *Jane*, *supra*; *Poole* v. *Archer*, (1685) 2 Show. 401, Skin. 210.

A lessee who covenants generally to repair is bound to rebuild if the house is burnt down by accident. See notes to *Walton* v. *Waterhouse*, (1772) 2 Wms. Saund. 826 (1871 ed.); *Bullock* v. *Dommitt*, (1796) 6 Term Rep. 650, 2 Chit. 608; *Morrogh* v. *Alleyne*, (1873) Ir. R. 7 Eq. 487.

But when from the nature of the contract it appears that the parties must have contemplated the continued

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existence of some specified thing as the foundation of what was to be done, in the absence of any warranty that the thing shall exist the contract is to be construed as subject to an implied condition that the parties shall be excused in case before breach performance becomes impossible from the perishing of the thing without default of the contractor. *Taylor* v. *Caldwell*, (1863) 3 B. & S. 826; followed, *Appleby* v. *Myers*, (1867) L. R. 2 C. P. 651; *Boast* v. *Firth*, (1868) L. R. 4 C. P. 1; *Robinson* v. *Davison*, (1871) L. R. 6 Ex. 269; *Howell* v. *Coupland*, (1876) 1 Q. B. D. 258; *Nickoll & Knight* v. *Ashton, Edridge & Co.*, [1901] 2 K. B. 126; *Krell* v. *Henry*, [1903] 2 K. B. 740; distinguished, *Turner* v. *Goldsmith*, [1891] 1 Q. B. 544.

The contract is not rescinded *ab initio*, but both parties are excused from any further performance under the contract. See *Blakeley* v. *Muller; Hobson* v. *Pattenden & Co.*, (1903) 88 L. T. 90, [1903] 2 K. B. 760, n.; *Civil Service Co-operative Society* v. *General Steam Navigation Co.*, [1903] 2 K. B. 756; *Chandler* v. *Webster*, [1904] 1 K. B. 493.

Similarly, where an event cannot be supposed to have been in the contemplation of the parties when the contract was made, they will not be held bound by general words which were not used with reference to the particular contingency which afterwards happens. *Baily* v. *De Crespigny*, (1869) L. R. 4 Q. B. 180, 185; distinguished *In re Arthur; Arthur* v. *Wynne*, (1880) 14 Ch. D. 603, 608.

By the act of God.

The act of God is in some cases said to excuse the breach of a contract. But it has been pointed out that this is an inaccurate expression; what is meant is that the thing done or left undone is not within the contract. *Baily* v. *De Crespigny*, *supra*, 185.

2. Discharge by Act of Law.

By common law.

Where the deed in which the covenants are contained, or the estate on which they depend, is gone and determined, the covenants are gone also. Therefore if a lease is surrendered, or a deed becomes void, and there are covenants contained in it, the covenants are gone also. But the surrender does not discharge a breach of covenant which was before the surrender. Shepp. Touch. 180.

As to a deed becoming void by alteration, see *Bishop of Crediton* v. *Bishop of Exeter*, [1905] 2 Ch. 455.

By statute.

As a general rule, a covenant is dissolved on both sides if its performance is made unlawful by a statute. Platt, Covenants, 588.

Brewster v. *Kitchel.*

Thus, if A. covenants to do a thing which is lawful, and a subsequent Act hinders him from doing it, the covenant is repealed. *Brewster* v. *Kitchel*, (1697) Holt, 175; *S. C.*, 1 Lord Raym. 321, 1 Salk. 198, 2 Salk. 615, 3 Salk. 340, 12 Mod. 166.

So, if A. covenants not to do a thing which was lawful to do, and an Act of Parliament afterwards compels him to do it, the statute repeals the covenant. *Ib.*; see also *Newington Local Board* v. *Cottingham Local Board*, (1879) 12 Ch. D. 725; *Wynn* v. *Shropshire Union Railways and Canal Co.*, (1850) 5 Ex. 420; *Doe* d. *Lord Anglesea*, v. *Rugeley Overseers*, (1844) 6 Q. B. 107.

But if A. covenants to do a thing which was unlawful, and a subsequent statute legalises the act, the statute does not repeal the covenant. Platt, Covenants, 588, citing 12 Mod. 169; see also *Jaques* v. *Withy*, (1788) 1 H. Bl. 65.

And if A. covenants not to do a thing which is unlawful,

and an Act makes it lawful, the Act does not repeal the covenant. *Brewster* v. *Kitchel, supra.*

It seems that the principle of *Brewster* v. *Kitchel* does not apply unless the impossibility of performing the covenant is directly attributable to the Act. See *Newly* v. *Sharpe*, (1878) 8 Ch. D. p. 46; *Gibbons* v. *Chambers*, (1885) 1 Cab. & E. 577.

(i.) *Compulsory Acquisition of Land under Statutory Powers.*

When land which is subject to a restrictive covenant is taken by agreement or compulsion under the powers of the Lands Clauses Consolidation Act, 1845, no action can be maintained for an injunction or damages against the covenantor (*a*) or the promoters of the undertaking (*b*) in respect of a breach of the covenant by the latter in the exercise of their statutory powers, unless the land is conveyed to the company subject to the covenant (*c*).

(*a*) *Baily* v. *De Crespigny*, (1869) L. R. 4 Q. B. 181; *Long Eaton Recreation Grounds Co.* v. *Midland Railway Co.*, [1902] 2 K. B. p. 584; (*b*) *Kirby* v. *School Board for Harrogate*, [1896] 1 Ch. 437; (*c*) *Ellis* v. *Rogers*, (1884) 29 Ch. D. 661.

If the proceedings of the promoters of the undertaking are *ultra vires* the covenant is enforceable against them. See *Batson* v. *The School Board for London*, (1903) 20 Times Rep. 22.

It was held in the case of a statutory restriction, that the land acquired by the company was freed from the restriction only for the purposes of the company's undertaking, and the restriction revived as to land sold as superfluous land. *Bird* v. *Eggleton*, (1885) 29 Ch. D. 1012.

The remedy of the owner of the land for the benefit of which the restriction was imposed is to obtain compensation under sect. 68 of the Lands Clauses Consolidation Act, 1845. *The Long Eaton Recreation Grounds Co.* v. *Midland Railway*, [1902] 2 K. B. 574.

It is not necessary to give notice to treat to a landowner entitled to the benefit of a restrictive covenant. *Clark* v. *School Board for London*, (1874) L. R. 9 Ch. 120.

It has been held that the Lands Clauses Consolidation Act does not enable a person, whose land has not been taken, to recover compensation for damage arising from lawful user of the company's works. *Hammersmith, &c., Railway Co.* v. *Brand*, (1869) L. R. 4 H. L. 171; *A.-G.* v. *Metropolitan Railway Co.*, [1894] 1 Q. B. 384; distinguished *The Queen* v. *Cambrian Railway Co.*, (1871) L. R. 6 Q. B. 422; *Fletcher* v. *Birkenhead Corporation*, [1906] 1 K. B. 605, 611.

Whether compensation could be recovered for breach of a covenant that no offensive trade should be carried on upon the land, see *Kirby* v. *School Board for Harrogate*, [1896] 1 Ch. 437, 453.

If a public-house is taken compulsorily under the powers of the Housing of the Working Classes Act, 1890, a covenant tying the house to the landlord's brewery must be taken into consideration in ascertaining the compensation payable to the landlord under sect. 21 of that Act. *In re Chandler's Wiltshire Brewery Co. & London County Council*, [1903] 1 K. B. 569.

Similarly, if a public-house is taken under the powers of the Lands Clauses Consolidation Act, 1845, a covenant tying the house to the landlord's brewery must be considered in assessing the compensation. *Bourne* v. *The Mayor of Liverpool*, (1868) 38 L. J. Q. B. 15; and see

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Re London County Council v. *City of London Brewery Co.*, [1898] 1 Q. B. 387.

Where a lease contains a power to re-enter if the land is compulsorily taken, the reversioner is entitled to compensation for the land as free from the lease. *In re Morgan & London and North Western Railway Co.*, [1896] 2 Q. B. 469.

As to compensation for a lessee's rights under a covenant for renewal, see *Bogg* v. *Midland Railway Co.*, (1867) L. R. 4 Eq. 310.

A local authority which has obtained a charge on land which is subject to a restrictive covenant, under sect. 257 of the Public Health Act, 1875, is not entitled to an order for sale of the land free from the restrictive covenant. *Guardians of Tendring Union* v. *Dowton*, [1891] 3 Ch. 265.

The service of notice to treat for part of the land included in a building agreement does not determine the agreement if it is severable, and neither party repudiates it. *Re Furness & the Willesden Urban District Council*, (1905) 22 Times Rep. 52.

A railway company selling superfluous land may impose restrictions upon the use of the land. *In re Higgins & Hitchman's Contract*, (1882) 21 Ch. D. 95.

(ii.) *Bankruptcy.*

Discharge of bankrupt covenantor.

Under sect. 30 of the Bankruptcy Act, 1883, an order of discharge releases the bankrupt from all debts provable in bankruptcy, with some exceptions mentioned in that section and in sect. 10 of the Bankruptcy Act, 1890.

Under sect. 37 of the Bankruptcy Act, 1883 (except as mentioned in sub-sects. 1 and 2), all debts and liabilities to which the debtor is subject at the date of the

receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, are deemed to be debts provable in bankruptcy. And the word "liability" is for the purposes of the Act to include any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant.

But there are covenants which are excluded from this section as having a different object from the payment of money in any event, *e.g.*, covenants in respect of which specific performance can be obtained and for which an injunction is the proper remedy. Thus, a restrictive covenant is not discharged by the bankruptcy of the covenantor. *Hardy* v. *Fothergill*, (1888) 13 App. Cas. p. 360; *In re Reis, Ex parte Clough*, [1904] 2 K. B. 769, 787.

The liability on a covenant to keep up policies of insurance (*a*), or to reinstate demised premises if destroyed by fire (*b*), is a debt provable in bankruptcy. (*a*) *In re S., Ex parte Bank of Ireland*, (1886) 17 L. R. Ir. 507; (*b*) *In re Blackburne, Ex parte Strouts*, (1892) 9 Morrell, 249.

If the assignee of a lease, who has covenanted to indemnify the assignor, becomes a bankrupt, and judgment is recovered against the assignor in respect of rent or insurance of the premises, the assignor can prove in the bankruptcy of the assignee for the amount paid. See *In re Hinks, Ex parte Verdi*, (1886) 3 Morrell 218; *In re Perkins; Poyser* v. *Beyfus*, [1898] 2 Ch. 182, 188.

The future and contingent liability of an assignee of a lease on his covenant to indemnify the lessee in respect of breaches of the lessee's covenant to repair is a debt provable in bankruptcy, unless an order of the

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Court declares it to be incapable of being fairly estimated. *Hardy* v. *Fothergill*, (1888) 13 App. Cas. 351; see also *In re Hinks*, *supra*.

As to proof by a lessor in the bankruptcy of his lessee when the lease is not disclaimed, see *In re New Oriental Bank Corporation* (No. 2), [1895] 1 Ch. 753; *In re Panther Lead Co.*, [1896] 1 Ch. 978.

The discharge of the bankrupt does not release any person who at the date of the receiving order was jointly bound or had made any joint contract with him. See sect. 30 (4).

The acceptance and approval of a composition or scheme of arrangement has a similar effect to an order of discharge. See Bankruptcy Act, 1890, sect. 3 (12), (19); *In re Croom*, [1891] 1 Ch. 695.

Disclaimer.

Freehold land burdened with onerous covenants may be disclaimed by a trustee in bankruptcy. See Bankruptcy Act, 1883, sect. 55; *In re Mercer & Moore*, (1880) 14 Ch. D. 287.

After-acquired freeholds vest in the trustee. See *In re New Land Development Association* v. *Gray*, [1892] 2 Ch. 138; followed, *Bird* v. *Philpott*, [1900] 1 Ch. 822, 831; *London and County Contracts, Limited* v. *Tallack*, (1903) 51 W. R. 408; *Official Receiver* v. *Cooke*, [1906] 2 Ch. 661.

(iii.) *The Statutes of Limitation.*

Action of covenant.

It is provided by 3 & 4 Will. IV. c. 42, sect. 3, that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, &c., shall be commenced and sued within twenty years after the cause of such actions or suits, but not after.

Disabilities.

If any person that is entitled to such action is at the time of such cause of action accruing under the disability of infancy, or a person *non compos mentis*, the action must be brought within twenty years from the disability ceasing (3 & 4 Will. IV. c. 42, sect. 4, as modified by 19 & 20 Vict. c. 97, sect. 10, and 45 & 46 Vict. c. 75, sect. 1 (2)).

If any person against whom there is any such cause of action is at the time the cause of action accrues beyond the seas, then the action may be brought against him "within such times as are before limited" after his return (3 & 4 Will. IV. c. 42, sect. 4; see also sect. 7).

If the action lies against two or more joint debtors the plaintiff is not entitled to any time within which to commence the action against a debtor who is not beyond the seas by reason only that some other such joint debtor was at the time such cause of action accrued beyond the seas, and is not barred from commencing an action against a joint debtor after his return by reason only that judgment was already recovered against any such joint debtor who was not beyond the seas (19 & 20 Vict. c. 97, sect. 11).

It has been suggested that sect. 11 of 19 & 20 Vict. c. 97 does not refer to any cause of action but that of actual debt. See Darby and Bosanquet, Statutes of Limitation, p. 60 (2nd ed.).

Acknowledgment.

If an acknowledgment is made by writing signed by the party liable or his agent, or by part payment or part satisfaction, the action may be brought within twenty years after such acknowledgment, or in case the person entitled to the action is, at the time of the acknowledgment, under disability, or the party making the acknowledgment is, at the time of making it, beyond the seas,

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then within twenty years after the disability has ceased or the party has returned from beyond the seas (3 & 4 Will. IV. c. 42, sect. 5).

An acknowledgment under this section need not be made to the person entitled, or amount to a promise to pay. *Moodie* v. *Bannister*, (1859) 4 Drew. 432, 28 L. J. Ch. 881; see also *Forsyth* v. *Bristowe*, (1853) 8 Ex. 716.

The acknowledgment must be that money remains due. Sect. 5 does not apply to a bond conditioned to perform a lessee's covenant to repair or any other matter sounding purely in damages. *Blair* v. *Ormond*, (1851) 17 Q. B. p. 437.

A part payment must be made by the party liable or his agent in order to amount to an acknowledgment. For, though the section does not expressly require this, payment is treated as a form of acknowledgment. *Coope* v. *Cresswell*, (1866) L. R. 2 Ch. p. 124; *Dibb* v. *Walker*, [1893] 2 Ch. p. 435; *Whitley* v. *Lowe*, (1858) 2 De G. & J. p. 712.

No joint or joint and several co-contractor or co-debtor, or executor, or administrator of any contractor, loses the benefit of the statute so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money by any other or others of such co-contractors or co-debtors, executors, or administrators. See 19 & 20 Vict. c. 97, sect. 14, considered, *Bailie* v. *Irwin*, [1897] 2 Ir. R. 614.

This section does not affect the rights or liabilities of co-contractors *inter se*. *Gardner* v. *Brooke*, [1897] 2 Ir. R. 6.

From when the statute runs.

Where there is a present debt and a covenant to pay on demand, no demand is necessary before bringing an action; but where there is a covenant to pay a collateral

sum on demand, the right of action does not accrue until demand is made. *In re J. Brown's Estate; Brown* v. *Brown*, [1893] 2 Ch. 300.

When a bond is conditioned for the performance of a series of acts, a new cause of action arises upon each default. *Amott* v. *Holden*, (1852) 18 Q. B. 593.

If a breach of covenant is complete the Statute of Limitations runs from the moment of the breach. See *Turner* v. *Moon*, [1901] 2 Ch. 828.

But in the case of a continuing breach, *e.g.*, the breach of a covenant to repair, the covenant is broken afresh every day the premises are out of repair, and a right of action accrues as often as damage actually arises from the breach. *Spoor* v. *Green*, (1874) L. R. 9 Ex. 99, 111; *Morrogh* v. *Alleyne*, (1873) Ir. R. 7 Eq. 487; *Maddock* v. *Mallett*, (1860) 12 Ir. C. L. R. 173.

In the case of covenants for seisin and good right to convey, a breach of the covenant is complete upon the execution of the conveyance. See *Turner* v. *Moon*, *supra*; *Spoor* v. *Green*, *supra*.

The judgment of Lord Ellenborough in *Kingdon* v. *Nottle*, (1815) 4 M. & S. 53, which appears to be inconsistent with this view, is, it seems, to be read as directed only to the question decided in that case, viz., when a covenant that a vendor was seised, &c., and had good right to convey, was broken in the time of the ancestor, but he sustained no damage in his lifetime, his devisee, and not his executor, was the proper plaintiff. See *Turner* v. *Moon*, *supra*, p. 829; *Morris* v. *Kennedy*, [1896] 2 Ir. R. 261; Rawle, Covenants for Title, 318, 324 (4th ed., 1873).

A covenant by a trustee or mortgagee that he has not incumbered is broken as soon as made if there is an

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incumbrance. See Sugden, Vendors and Purchasers, 610 (14th ed.); *Hamington & Ryder's Case*, (1587) 1 Leon. 92, Moore. 249, pl. 393.

But a vendor's covenant that a purchaser shall enjoy free from incumbrances is not broken so long as he enjoys the land free from incumbrance. See *Vane* v. *Lord Barnard*, (1708) Gilb. Eq. R. 6.

A covenant for quiet enjoyment is not broken until disturbance. Sugden, Vendors and Purchasers, *supra*. *Cf. Ireland* v. *Bircham*, (1835) 2 Scott, 207.

Restrictive covenants.

A restrictive covenant is not extinguished by virtue of sect. 34 of 3 & 4 Will. IV. c. 27. *In re Nisbet & Potts' Contract*, [1905] 1 Ch. 391, [1906] 1 Ch. 386.

Covenants to pay rent in leases.

By 3 & 4 Will. IV. c. 27, sect. 42, it is provided that no arrears of rent or interest in respect of any sum of money charged upon or payable out of any land or rent, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent, &c.

This section contains no proviso in favour of persons under disability (*a*), and makes no mention of part payment (*b*). (*a*) See *De Beauvoir* v. *Owen*, (1850) 5 Ex. p. 182; *Conolly* v. *Gorman*, [1898] 1 Ir. R. p. 35; (*b*) *Astbury* v. *Astbury*, [1898] 2 Ch. at p. 115.

This section is not repealed by 3 & 4 Will. IV. c. 42, sect. 3. *Humfrey* v. *Gery*, (1849) 7 C. B. 567.

The joint effect of these enactments is that not more than six years' arrears of rent or interest in respect of any sum charged on or payable out of any land or rent

shall be recovered by distress (*a*), action, or suit, except an action on covenant or debt on specialty, in which case the limitation would be twenty years. *Hunter* v. *Nockolds*, (1849) 19 L. J. Ch. 177. (*a*) As to agricultural holdings, see 46 & 47 Vict. c. 61, sect. 44.

Sect. 1 of 37 & 38 Vict. c. 57 does not apply to rent reserved on a demise (*a*), and sect. 8 does not apply to a covenant to pay such rent (*b*). (*a*) *Grant* v. *Ellis*, (1841) 9 M. & W. 113; *Doe* d. *Angell* v. *Angell*, (1846) 9 Q. B. 355; (*b*) *Donegan* v. *Neill*, (1885) 16 L. R. Ir. 309.

Thus, if covenant for rent be brought upon an indenture of demise, the period of limitation is twenty years. *Paget* v. *Foley*, (1836) 2 Bing. N. C. 679; *Strachan* v. *Thomas*, (1840) 12 A. & E. 558; *Darley* v. *Tennant*, (1885) 53 L. T. 257.

Covenant to pay a rent-charge.

In an action on a covenant to pay a rent-charge twenty years' arrears were held to be recoverable. *Manning* v. *Phelps*, (1854) 10 Ex. 59; *Strachan* v. *Thomas*, (1840) 12 A. & E. 536, 558; *cf.* *Mouys* v. *Leake*, (1799) 8 Term Rep. 411.

When a rent-charge has remained unpaid for more than twelve years, and no acknowledgment has been given, it is extinguished. See 37 & 38 Vict. c. 57, sects. 1 and 9; 3 & 4 Will. IV. c. 27, sect. 34; *Jones* v. *Withers*, (1896) 74 L. T. 572, 576; *Howitt* v. *Earl of Harrington*, [1893] 2 Ch. 497.

But it has been held in the case of a mortgage that twelve years is a bar to an action on the covenant to pay the mortgage money. For this is within sect. 8 of 37 & 38 Vict. c. 57. *Sutton* v. *Sutton*, (1882) 22 Ch. D. 511; *Fearnside* v. *Flint*, (1883) 22 Ch. D. 579; *In re Powers*, (1885) 30 Ch. D. 291; *In re Frisby*, (1889) 43 Ch. D. 106; *Kirkland* v. *Peatfield*, [1903] 1 K. B. 756.

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As against the land six years' arrears of a rent-charge are recoverable (*a*); but if twelve years have elapsed none of the past instalments can be recovered (*b*). (*a*) See 3 & 4 Will. IV. c. 27, sect. 42; *Humfrey* v. *Gery*, (1849) 7 C. B. 567; (*b*) *per* Kay, J., *Hughes* v. *Coles*, (1884) 27 Ch. D. 231; *Jones* v. *Withers*, (1896) 74 L. T. 572.

In equity.

A Court of Equity always refused its aid to stale demands. As, however, it had no legislative authority, it could not define exactly the time of bar. But as often as Parliament prescribed a limit to proceedings at law the Court of Chancery adopted that rule and applied it to similar cases in equity. See *per* Lord Camden, *Smith* v. *Clay*, (1767) 3 Bro. C. C. 639, n.; *Bulli Coal Mining Co.* v. *Osborne*, [1899] A. C. 363; *Knox* v. *Gye*, (1872) L. R. 5 H. L. 674; *Hovenden* v. *Annesley*, (1806) 2 Sch. & Lef. 630; *Foley* v. *Hill*, (1844) 1 Ph. 399; *Gibbs* v. *Guild*, (1882) 9 Q. B. D. 64.

Moreover, the Statutes of Limitation in some cases extend to suits in equity, *e.g.*, see sect. 24 of 3 & 4 Will. IV. c. 27; *Archbold* v. *Scully*, (1861) 9 H. L. Cas. 360.

A Court of Equity also gives effect to the exceptions in the statutes as to disabilities, &c. *White* v. *Ewer*, (1670) 2 Vent. 340.

But the Statutes of Limitation are not binding in equity in cases in which the Court of Chancery held that it was inequitable to adopt them, *e.g.*, in cases of fraud (*a*) or an express trust (*b*). (*a*) See *Bulli Coal Mining Co.* v. *Osborne*, [1899] A. C. p. 363; (*b*) see 36 & 37 Vict. c. 66, sect. 25 (2); 51 & 52 Vict. c. 59, sect. 8; *North American Land and Timber Co.* v. *Watkins*, [1904] 1 Ch. 242, 2 Ch. 233.

If there is a Statute of Limitations the objection of simple laches, as distinguished from acquiescence, does not apply until the expiration of the time allowed by statute. The fact of simply neglecting to enforce a claim for the period during which the law permits a party to delay, without losing his right, cannot be an equitable bar. See *per* Lord Wensleydale, *Archbold* v. *Scully*, (1861) 9 H. L. Cas. 383; *per* Lord Chelmsford, *ib.* 388; *Rochdale Canal Co.* v. *King*, (1851) 2 Sim. N. S. 89; *De Bussche* v. *Alt*, (1878) 8 Ch. D. 286.

Thus a plaintiff does not lose his right to sue on a covenant by mere delay, if the Statute of Limitations has not run. *In re Baker; Collins* v. *Rhodes*, (1881) 20 Ch. D. 230; *cf. In re Madderer*, (1883) 27 Ch. D. 523.

Similarly if an injunction is sought in aid of a legal right, the plaintiff is not precluded from obtaining the injunction merely by lapse of time, if the legal right is not barred by the statute. *Fullwood* v. *Fullwood*, (1878) 9 Ch. D. 176.

The jurisdiction of Courts of Equity in refusing relief "on the ground of acquiescence or otherwise" is expressly reserved by sect. 27 of 3 & 4 Will. IV. c. 27.

In the case of a purely equitable claim, where neither the Statute of Limitations applies, nor can the analogy of the statute be invoked, staleness of demand may be a good defence. See *Blake* v. *Gale*, (1886) 32 Ch. D. 571, 581; *Leahy* v. *De Moleyns*, [1896] 1 Ir. R. 206; *In re Sharpe*, [1892] 1 Ch. 154, 168; *Pilson* v. *Spratt*, (1889) 25 L. R. Ir. 5.

Courts of Equity, then, "look at the delay which has taken place, coupled with the circumstances under which it has taken place, in order to see whether or not the

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true inference to be drawn from such delay under such circumstances is that the party claiming the right either agreed to abandon or release his right, or else has so acted as to induce the other parties to alter their position on the reasonable faith that he has done so." If that is the inference to be drawn the claim will be treated as abandoned. See *per* Bowen, L.J., *Blake* v. *Gale*, *supra*.

3. Discharge by Act of the Parties.

Release.

At common law a covenant cannot be varied (*a*) or discharged (*b*) by parol. (*a*) *The Thames Iron Works Co.* v. *The Royal Mail Steam Packet Co.*, (1862) 13 C. B. N. S. 358; *Ellen* v. *Topp*, (1851) 20 L. J. Ex. 241; *Flinn* v. *Calow*, (1840) 1 Man. & G. 589; *Rippinghall* v. *Lloyd*, (1833) 5 B. & Ad. 742; (*b*) *Spence* v. *Healey*, (1853) 8 Ex. 668; *West* v. *Blakeway*, (1841) 3 Scott N. R. p. 215.

Thus, a parol agreement cannot be set up at law in answer to an action on a covenant. *West* v. *Blakeway*, (1841) 3 Scott, N. R. 199; *Harris* v. *Goodwyn*, (1841) 2 Scott, N. R. 459.

But a subsequent parol contract which is not inconsistent with the contract by deed might be enforced by an action of assumpsit. *White* v. *Parkin*, (1810) 12 East,578; see also *Braddick* v. *Thompson*, (1807) 8 East, p. 346; *Smith* v. *Battams*, (1857) 26 L. J. Ex. 232.

Moreover, an agreement not to enforce the covenants in a deed may be a good consideration for a parol promise which varies the provisions of the deed; and the enforcement of such promise is not open to the objection that it is seeking to vary the terms of an instrument

under seal. *Nash* v. *Armstrong*, (1861) 10 C. B. N. S. 259; 30 L. J. C. P. 286.

The performance of the parol agreement may be a good defence in equity to an action upon a covenant contained in the deed. *Ib.* 10 C. B. N. S. p. 262.

Also in equity there may be considerations which will prevent a debt from being enforced although it may be subsisting at law. *Taylor* v. *Manners*, (1865) L. R. 1 Ch. 48; *Yeomans* v. *Williams*, (1865) L. R. 1 Eq. 184.

Thus, if money's worth is accepted in place of money in discharge of a bond, the debt in equity is gone. *Webb* v. *Hewitt*, (1857) 3 K. & J. 438; *Steeds* v. *Steeds*, (1889) 22 Q. B. D. p. 540.

If there were circumstances which made it inequitable to enforce a bond, the Court of Chancery would restrain proceedings at law upon it. See *Major* v. *Major*, (1852) 1 Drew. 165; *Money* v. *Jordan*, (1852) 2 De G. M. & G. 318; *per* Wills, J., *Steeds* v. *Steeds*, *supra*.

Discharge of the right of action arising from a breach of covenant.

In some cases the covenant is at an end if a right of action arising from a breach of the covenant is discharged. If the covenant is "to do an act of solitary performance," and damages are recovered for a breach, the covenant is extinct. See Platt, Covenants, 587.

If the plaintiff recovers judgment on a covenant to pay a sum of money, the covenant merges in the judgment. *Ex parte Fewings*, (1883) 25 Ch. D. 338, 355; approved, *Economic Life Assurance Society* v. *Osborne*, [1902] A. C. 147, 149.

Accord and satisfaction.

After breach of a covenant a parol agreement may operate by way of accord and satisfaction. *Smith* v. *Trowsdale*, (1854) 3 El. & Bl. 83; 23 L. J. Q. B. 107.

But accord and satisfaction made before breach cannot

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be pleaded in bar of an action of covenant. *Kaye* v. *Waghorn*, (1809) 1 Taunt. 428.

Accord and satisfaction after breach is a good plea, because the subject-matter of the payment and acceptance in satisfaction is, not the covenant, but the damages sustained by the particular breach of it. So where the cause of action does not accrue merely by the deed, but by some matter of fact, as the accrual of rent. *May* v. *Taylor*, (1843) 6 Man. & G. 262, n., and cases there cited; *Spencer* v. *Healey*, (1853) 8 Ex. 668, n.; *Blake's Case*, (1605) 6 Rep. 43b

At law accord and satisfaction of a debt due upon a bond is no ar to the action. *Steeds* v. *Steeds*, (1889) 22 Q. B. D. p. 539.

For, in the case of a covenant or bond to pay a sum of money, the duty accrues by the deed alone. *Blake's Case*, *supra*; *Preston* v. *Chrismas*, (1759) 2 Wils. 86; *Rogers* v. *Payne*, (1768) 2 Wils. 376.

But by the rule in equity, which now prevails, accord and satisfaction is an answer to an action for a specialty debt. *Steeds* v. *Steeds*, (1889) 22 Q. B. D. 537.

Covenant not to sue.

A covenant not to sue at any time operates as a release (*a*); for if it operated only as a covenant, it would produce two actions (*b*). (*a*) *Hodges* v. *Smith*, (1598) Cro. Eliz. 623; *Burgh* v. *Preston*, (1800) 8 Term Rep. 483, 486; *Ford* v. *Beech*, (1848) 11 Q. B. p. 871; (*b*) *Smith* v. *Mapleback*, (1786) 1 Term Rep. p. 446.

But a covenant not to sue within a limited time does not operate as a release (*a*); unless there is an express provision that during the limited time the deed may be pleaded in bar (*b*). (*a*) *Ayloffe* v. *Scrimpshire*, (1689) Carth. 63; *Thimbleby* v. *Barron*, (1838) 3 M. & W. 210, 216; (*b*) *Gibbons* v. *Vouillon*, (1849) 8 C. B. 483,

499; *Walker* v. *Nevill*, (1864) 3 H. & C. 403; *Corner* v. *Sweet*, (1866) L. R. 1 C. P. 456; *Bailey* v. *Bowen*, (1868) L. R. 3 Q. B. 133.

A covenant not to sue one of two joint (*a*) or joint and several (*b*) debtors or contractors does not release the other. (*a*) *Hutton* v. *Eyre*, (1815) 6 Taunt. 289; *Willis* v. *De Castro*, (1858) 4 C. B. N. S. 216; (*b*) *Dean* v. *Newhall*, (1799) 8 Term Rep. 168; 2 Wms. Saund. 141 (1871 ed.).

A covenant by A. not to sue for a debt due to him alone is not a release of a debt due to A. and B. jointly. *Walmesley* v. *Cooper*, (1839) 11 A. & E. 216.

Repudiation.

It has been questioned whether the doctrine that a distinct refusal by one party to be bound by a contract in the future entitles the other party to treat the contract as at an end (see *Rhymney Railway Co.* v. *Brecon, &c., Railway Co.*, (1900) 83 L. T. 111) applies to a covenant contained in a lease. *Johnstone* v. *Milling*, (1886) 16 Q. B. D. 460.

Prevention of performance.

A covenantor who puts it out of his power to perform the covenant commits a breach of the covenant, giving rise to an immediate right of action. *Sir Anthony Main's Case*, (1596) 5 Rep. 20 b. *Ford* v. *Tiley*, (1827) 6 B. & C. 325; *Synge* v. *Synge*, [1894] 1 Q. B. 466.

The covenantor is exonerated from the performance of his covenant when performance is prevented by the wrongful act of the covenantee. *Roberts* v. *Bury Commissioners*, (1870) L. R. 5 C. P. p. 329; *Raymond* v. *Minton*, (1866) L. R. 1 Ex. 244; *Learoyd* v. *Brook*, [1891] 1 Q. B. 431.

Acts of third parties.

But a covenantee's right to the performance of the covenant is not defeated by the acts of a third party. Platt, Covenants, 601.

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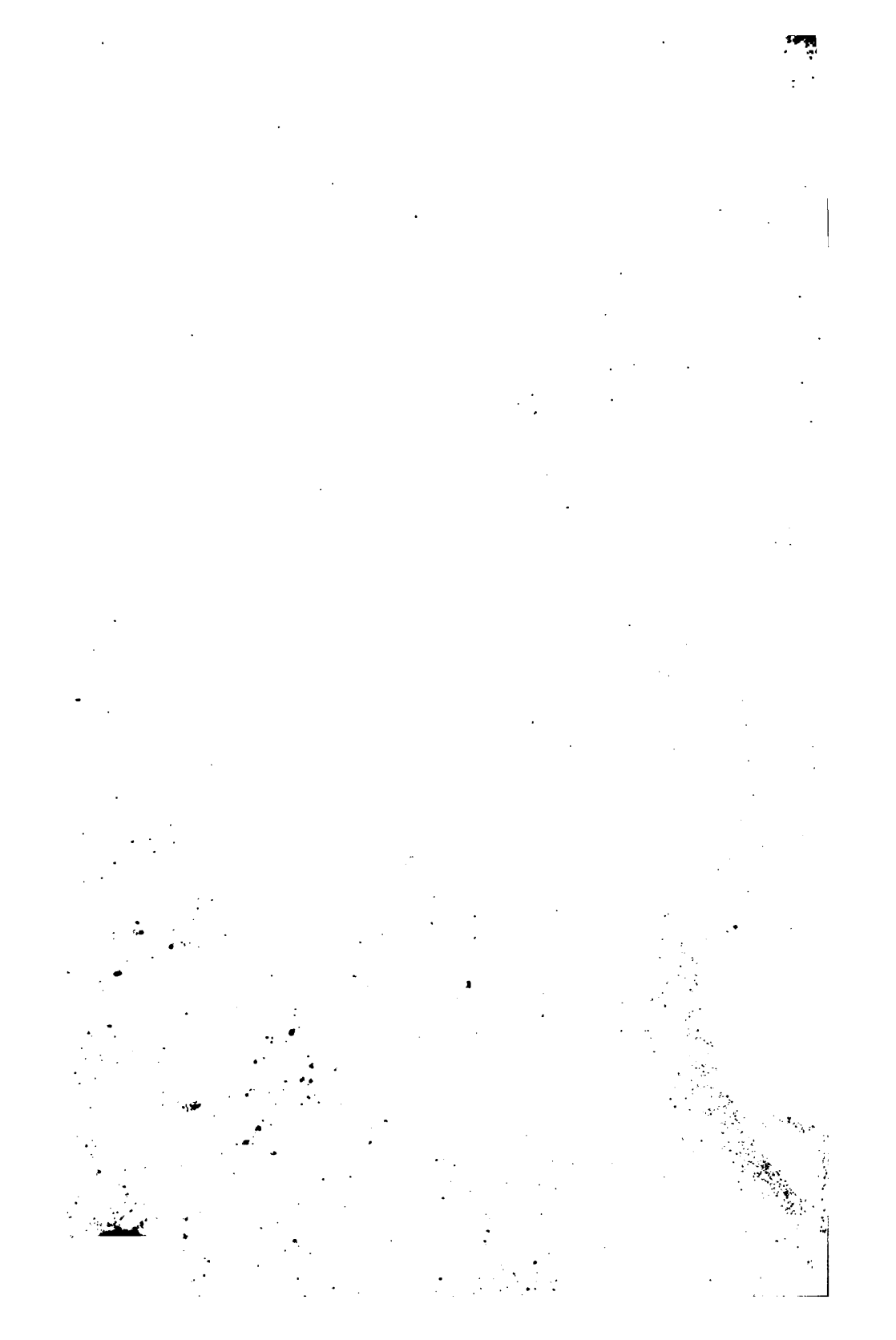

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